

(30,421)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 456

A. G. RISTY ET AL., AS COUNTY COMMISSIONERS, ET AL.,
APPELLANTS,

vs.

GREAT NORTHERN RAILWAY COMPANY

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1923, of said Court, before the Honorable William S. Kenyon, Circuit Judge, and the Honorable Jacob Trieber and the Honorable David P. Dyer, District Judges.

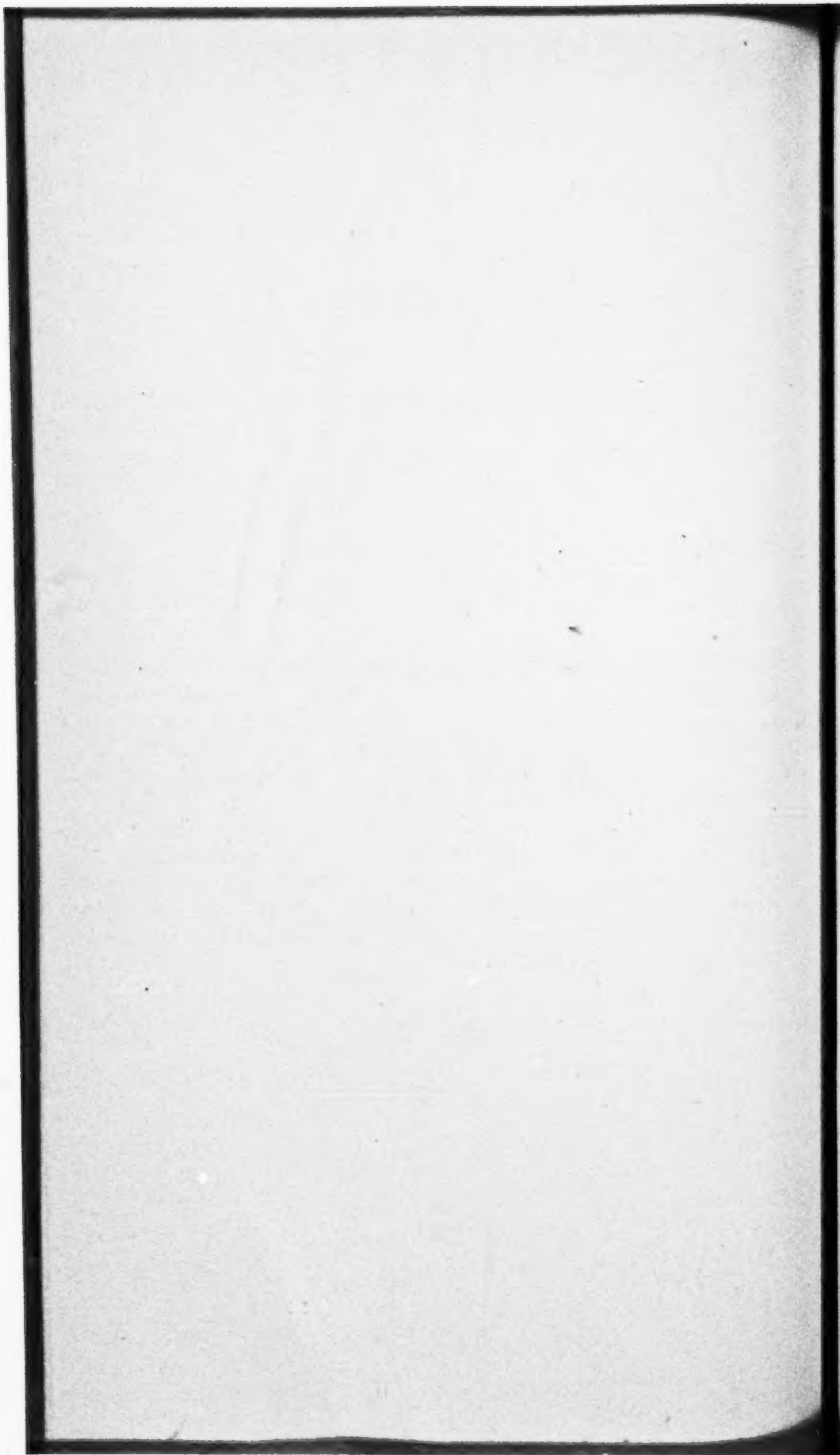
Attest:

(Seal)

E. E. KOCH,

Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twentieth day of March, A. D. 1923, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of South Dakota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein A. G. Risty, et al., as County Commissioners, etc., et al., were Appellants and the Great Northern Railway Company was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:



1

(Affidavit of Service of Citation.)

In the District Court of the United States for the District of South Dakota, Southern Division.

Great Northern Railway Company, Plaintiff,

vs.

A. G. Risty, et al., Defendants,

and

Minnehaha National Bank et al, Intervening Defendants.

District Court of the United States

District of South Dakota—ss.

W. C. Welsh, being first duly sworn on oath, deposes and says: That he is a citizen and elector of the State of South Dakota. That he served the hereto attached citation in the above entitled cause upon the above named plaintiff on the 8th day of December, 1922, in the city of Sioux Falls, South Dakota, by then and there handing to and leaving with Harry Judge, its solicitor, a true copy of said citation.

W. C. WELSH.

Subscribed and sworn to before me this 8 day of December, 1922.

(Notarial Seal)

DOUGLAS S. ELLIOTT,
Notary Public, South Dakota.

2

Citation.

In the District Court of the United States, for the District of South Dakota, Southern Division.

Great Northern Railway Company, Plaintiff,

No. 103. vs. In Equity.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J.

O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Commercial & Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe and W. G. Porter, Intervening Defendants.

United States of America to the above named Plaintiff, Great Northern Railway Company—Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the Southern Division, District of South Dakota, wherein the Great Northern Railway Company is complainant and A. G. Risty et al., as County Commissioners of Minnehaha County, South Dakota, are defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al., are intervening defendants an appeal has been allowed the above named defendants and intervening defendants therein to the Circuit Court of Appeals, Eighth Judicial Circuit. You are hereby cited and admonished to be and appear at said Court at the City of St. Paul in the State of Minnesota sixty days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable James D. Elliott, Judge of the United States District Court for the Southern Division, District of South Dakota, this 25 day of November, 1922.

JAS. D. ELLIOTT, Judge.

Service of the foregoing Citation, by receipt of copy, at Sioux Falls, South Dakota, is hereby admitted this day of, A. D., 1922.

.....
Solicitor for Great Northern Railway
Company, Plaintiff.

Endorsed: Filed in the District Court on Dec. 13, 1922 at 2 P. M.

5 In the District Court of the United States of America,
for the District of South Dakota, Southern Division.

Great Northern Railway Company, Plaintiff,
No. 103 S. Div. vs. In Equity.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants.

Be It Remembered, that on the 1st day of August, A. D. 1921, there was filed in the above entitled court, on behalf of the plaintiff, a Bill in Equity; which said Bill in Equity, excluding the verification and Exhibit A, is in words and figures the following, to-wit:

6 (Bill of Complaint.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

Great Northern Railway Company, Plaintiff,
vs.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock as County Commissioners of Minnehaha County, South Dakota; Fred E. Ward as Auditor of Minnehaha County, South Dakota; and J. O. Anderson as Treasurer of Minnehaha County, South Dakota, Defendants.

The plaintiff, a corporation of the state of Minnesota and a resident and citizen of said state of Minnesota, brings this its bill of complaint against A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota,

Fred E. Ward, as auditor of Minnehaha County, South Dakota, and J. O. Anderson, as treasurer of Minnehaha County, South Dakota, residents and citizens of the state of South Dakota and of the southern division of the district of South Dakota, and respectfully shows unto the court:

First.

That the plaintiff is and was during all of the times hereinafter mentioned a corporation organized and existing under and by virtue of the laws of the state of Minnesota, and a resident and citizen of the said state of Minnesota within the meaning and intent of the laws conferring jurisdiction upon the district court of the United States.

Second.

7 That the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock, Fred E. Ward, and J. O. Anderson, are each of them residents and citizens of the state of South Dakota and of the southern division of the district of South Dakota within the meaning and intent of the laws conferring jurisdiction upon the district courts of the United States.

Third.

That the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, and C. T. Charnock are the duly elected, qualified and acting county commissioners of the county of Minnehaha, in the State of South Dakota and constitute the board of county commissioners of said county of Minnehaha; that the defendant, G. W. Tyler, is a duly elected and qualified commissioner of said county of Minnehaha, and claims to be the legal commissioner of said county in place of said Chris Olson; that the defendant, Fred E. Ward, is the duly elected, qualified and acting auditor of the said County of Minnehaha, and that the defendant, J. O. Anderson, is the duly elected, qualified and acting treasurer of the said county of Minnehaha.

Fourth.

That the Legislature of the State of South Dakota at the ninth session thereof enacted a purported law entitled: "An Act Providing for the Establishment, Construction and Maintenance of Drainage and Levees in Counties Whenever Such Drainage Shall be Conducive to the Public Health, Convenience or Welfare", which purported act was approved by the Governor of the State of South Dakota on March 7, 1905,

and which purported act is commonly known as Chapter 98 of the Session Laws of South Dakota of 1905; that
8 subsequently and at its tenth session the Legislature of the State of South Dakota re-enacted said Chapter 98 of the Session Laws of 1905 by enacting a purported law entitled: "An Act Providing for the Establishment, Construction and Maintenance of Drainage and Levees in Counties Whenever Such Drainage Shall be Conducive to the Public Health, Convenience or Welfare or Whenever it Shall be Necessary or Practicable for Drainage of Agricultural Lands", which purported law was approved by the Governor of the State of South Dakota February 21, 1907, and which purported law is commonly known as Chapter 134 of the Session Laws of South Dakota of 1907; that by said Chapter 134 of the Session Laws of 1907 the Legislature of the State of South Dakota attempted to re-enact said purported law known as Chapter 98 of the Session Laws of 1905, together with amendments thereto; that subsequently the Legislature of the State of South Dakota at the Sixteenth Session thereof re-enacted said Chapter 134 of the Session Laws of 1907 with amendments thereto and that such re-enactment is contained in the South Dakota Revised Code 1919, as Sections 8458 to 8491 inclusive thereof; that at its special session in the year 1920, the Legislature of the State of South Dakota amended sections 8464, 8671, 8472, and 8473 of said Revised Code by Chapter 46 of the laws of the second special session of 1920; that a copy of the purported law of the State of South Dakota known as Chapter 98 of the Session Laws of 1905 as amended and re-enacted as Chapter 134 of the Session Laws of 1907, and as amended and re-enacted as Sections 8458 to 8491 of the South Dakota Revised Code, 1919, and amended at
9 the second special session of 1920 is hereto attached, marked "Exhibit A", and made a part hereof.

Fifth.

That prior to the year 1916 the Board of County Commissioners of the said County of Minnehaha established within said County a drainage ditch known as "Drainage Ditches No. 1 and No. 2", which drainage ditches were designed for the purpose of draining upwards of twenty thousand acres of agricultural land situated in Townships 101, 102, 103 and 104 North, of Range 49, West of the Fifth Principal Meridian, in the said County of Minnehaha; that said drainage ditches were established pursuant to and under the provisions of said purported Law known as Chapter 134 of the Session Laws of South Dakota of 1907, and extended for a dis-

tance of several miles through said townships, and were fully completed prior to the year 1916; that an assessment for the cost of the construction of said drainage ditches No. 1 and No. 2 was made prior to the year 1916; that prior to said assessment the said board of county commissioners equalized the benefits to the lands so assessed and by such equalization of benefits established the area of the drainage district and determined the various properties benefitted by said drainage ditches No. 1 and No. 2; and that all matters connected with the construction of said ditches and with the assessment of the costs thereof were fully completed prior to the year 1916.

10 That none of the property of plaintiff described in the purported drainage ditch notice hereinafter referred to, of which "Exhibit C" is a copy, and none of its property or rights whatsoever was included in the property assessed as aforesaid for the construction of said drainage ditches No. 1 and No. 2; that in the equalization of benefits made by said Board of County Commissioners of the said County of Minnehaha prior to the making of said assessment no part of said property and none of plaintiff's property or rights whatsoever was included or found to be benefitted; that no property or rights whatsoever of the plaintiff are within the drainage district of said drainage ditches No. 1 and No. 2, and that the said defendants, the county commissioners of the said County of Minnehaha, have no power or jurisdiction to include within said drainage district any property or rights whatsoever of plaintiff or to find and determine that any such property or rights have been benefitted by the construction and maintenance of said drainage ditches No. 1 and No. 2, or to assess said property or rights for any sum or sums whatsoever.

Sixth.

That the land drained by said drainage ditches No. 1 and No. 2 is situated in the valley of the Big Sioux north of the city limits of the city of Sioux Falls, which city is a municipality of upwards of twenty-five thousand inhabitants; that the Big Sioux River flows in a southerly direction through said townships 101, 102 and 103 north of said Range 49, West of the Fifth Principal Meridian, and that the City of Sioux Falls is situated in said Township 101; that after entering said township 101 at the northern boundary line thereof the said Big Sioux River flows in a southerly direction to the vicinity of the southern boundary line of said township and then flows in an easterly direction for a dis-

11 tance of some miles and then in a northerly direction through the said City of Sioux Falls and towards the north line of said township and then continues in an easterly direction until it passes out of said township over the eastern line thereof; that in its course in a northerly direction through the City of Sioux Falls the said Big Sioux passes over a series of falls aggregating approximately ninety feet; that the city water supply of the said City of Sioux Falls is situated in a graveled bed extending over a considerable area in said townships 101 and 102 north of the city of Sioux Falls; that the South Dakota State Penitentiary is situated north of the said City of Sioux Falls, and that said penitentiary and the lands belonging thereto are situated in said townships 101 and 102.

Seventh.

That the Big Sioux River has its source in Lake Pelican adjoining the City of Watertown in the County of Codington and State of South Dakota, which City of Watertown is situated approximately one hundred miles north of the City of Sioux Falls; that from the said City of Watertown the said Big Sioux River flows in a generally southerly direction but with many crooks and bends through the counties of Codington, Hamlin, Brookings and Moody to the City of Sioux Falls, in the County of Minnehaha, and that the said Big Sioux River during its southward course drains a large area of territory both eastward and westward of its channel.

Eighth.

That none of the property of plaintiff described in said purported drainage notice, of which "Exhibit C" is a copy, is agricultural land; that plaintiff is a corporation engaged in the operation of a line of railroad in the said county of Minnehaha; that all of its property in said county of Minnehaha consists of its right-of-way, station grounds, yards, line of railroad, bridges, culverts, and other property employed in the maintenance and operation of its line of railway; that it is not engaged in any agricultural operations, and that the reconstruction of said spillway and the construction of said retaining gates, dams, ditches and other work done as hereinafter pleaded by the board of county commissioners of the said county of Minnehaha, conferred no benefits upon plaintiff or its property; that no portion of the property of plaintiff upon which an apportionment of benefits is now sought to be made is subject to overflow, or is in danger of damage by overflow, or is situated within or adjacent to any lands sub-

ject to overflow, or is drained to any extent by said
12 spillway, and other improvements or benefitted thereby.

Ninth.

That as originally constructed said drainage ditches No. 1 and No. 2 emptied into the Big Sioux River through a ditch constructed across the land immediately north of the City of Sioux Falls, which ditch was between the City of Sioux Falls and the graveled bed from which said city obtained its water supply, and emptied into the Big Sioux River in the Northeast portion of the City of Sioux Falls and north of the series of falls situated upon said river along its course through the said City of Sioux Falls; that subsequent to the construction of said drainage ditches No. 1 and No. 2 and about the years 1915 and 1916, the volume of water passing through said drainage ditches caused the outlet of said drainage ditches into the Big Sioux River to wash out a channel upon the land through which said outlet was constructed to such an extent that there arose imminent danger that the course
13 of the Big Sioux River would be changed so that all of the water in the channel of said river would be diverted through said drainage ditches and the outlet thereof, and a new channel formed by said ditches which would cause the water in said river to cease flowing through its proper and natural channels and over the series of falls in the City of Sioux Falls, and to flow instead through said drainage ditches and the outlet thereof into the Big Sioux River at a point north of the City of Sioux Falls; that such diversion of the channel of the said Big Sioux River threatened to cause enormous damage to property in the said City of Sioux Falls situated along the channel of said river, and to destroy the water power obtained from said river at the falls thereof, and also to destroy the municipal water supply of the said City of Sioux Falls by draining the water from the gravel bed from which said municipal water supply is obtained.

Tenth.

That the Board of County Commissioners of the said County of Minnehaha, for the purpose of repairing and maintaining said drainage ditches No. 1 and No. 2 in such manner as to avoid the threatened change in the channel of the Big Sioux River and to prevent the drainage of the gravel bed from which the City of Sioux Falls obtains its municipal water supply, and to prevent the injury to the property owners of the City of Sioux Falls and the destruction of the water

power at the falls of the Big Sioux River in the City of Sioux Falls, which would be caused by the threatened change in the channel of the Big Sioux River, caused to be constructed in the summer of the year 1916 various dams and gateways at various places along said drainage ditches No. 1 and No. 2, made changes in the channel of the Big Sioux River along the course of said drainage ditches and caused to be re-constructed the spillway at the outlet of said drainage ditches into the Big Sioux River; that said construction work was done for the purpose of draining lands in addition to the lands theretofore found to be benefitted by and assessed for the cost of the installation and construction of said drainage ditches No. 1 and 2, but for the sole and only purpose of maintaining said drainage ditches No. 1 and No. 2 in such manner as to permit them to attempt to perform the function for which they were originally constructed without danger of damage to the property and rights theretofore threatened as hereinbefore pleaded.

Eleventh.

That there has been expended by the Board of County Commissioners of said Minnehaha County upon the construction of ditches, dams, gate-ways and other work as aforesaid, and upon the reconstruction of said spillway upon the outlet of said Drainage Ditches No. 1 and No. 2 a sum in excess of Two Hundred Fifty-five Thousand (\$255,000.00) for which said sum the said Board of County Commissioners has issued drainage warrants, and that there is due for principal and interest upon said warrants a sum, as plaintiff is informed and believes, in excess of three hundred thousand dollars.

Twelfth.

That before the construction of said spillway, dams, retaining gates, and other work, and straightening of the channel of the Big Sioux River, no petition therefor signed by one or more owners of land likely to be affected was ever made or presented to the Board of County Commissioners of the said County of Minnehaha, excepting that on or about the 3rd day of August, 1916, there was filed in the office of the County Auditor of the said County of Minnehaha a purported petition signed by F. L. Blackman and other persons, which said petition purported to be a petition "to reconstruct and improve Drainage Ditches No. 1 and No. 2 in Minnehaha County, South Dakota, and to construct a new spillway and outlet to said Drainage Ditches No. 1 and No. 2,

and to pay therefor by assessment upon the property, persons and corporations benefitted thereby"; that drainage ditch No. 1 and 2 referred to in said purported drainage notice, of which "Exhibit C" is a copy, is a combination of and is the same drainage Ditches No. 1 and No. 2 hereinbefore referred to; that the owners of some of the property included within the drainage area of drainage ditches No. 1 and No. 2 as theretofore established as aforesaid, objected to the repair of said ditches and to the assessment of their property for the cost of said repairs and of the maintenance of said ditches, and that on account of such objections and as a mere subterfuge and for the sole and only purpose of attempting to lay a foundation authorizing the Board of County Commissioners of said Minnehaha County to change the boundaries of the drainage area or district of said drainage ditches No. 1 and No. 2, and to assess property not included within the area of said drainage ditches and not benefitted by said ditches No. 1 and No. 2, for the cost of the necessary repairs and maintenance of said ditches theretofore established, constructed and accepted, the then Board of County Commissioners of said County of Minnehaha, caused the said purported petition hereinbefore in this paragraph referred to, to be filed, and that said Board of County Commissioners acquired by the filing of said petition no power or jurisdiction under and by virtue of the drainage laws of the State of South Dakota hereinbefore referred to, to proceed in any manner to include any of the property of plaintiff within the drainage area or district of said Ditches No. 1 and No. 2 or of said ditches No. 1 and 2 and that said Board and the said defendants now constituting said Board never acquired and have no power

16 or jurisdiction to determine that any of the property of plaintiff is benefitted by said drainage ditches No. 1 and 2, now attempted to be designated drainage ditch No. 1 and 2, or to assess said property, or any portion thereof, for the cost of the necessary repairs and maintenance of said drainage ditches No. 1 and No. 2; that upon the filing of said purported petition the County Commissioners of said County of Minnehaha did not transmit a copy of the same to the State Engineer of the State of South Dakota; that the said Board of County Commissioners of the said County of Minnehaha did not inspect the proposed route of said drainage ditches and did not cause a survey of said drainage ditches to be made by a surveyor; that no survey of the same was ever made under the general supervision of the State Engineer of the State of South Dakota, or otherwise prior to the construction thereof; that no surveyor's report

in writing was made to the said Board of County Commissioners; that no surveyor's report, or copy of any map or plan made or filed by said surveyor was furnished to the said State Engineer prior to the beginning of said work; that the said Board of County Commissioners of said Minnehaha County did not file with the said purported petition its determination of its costs, length and width of the drainage improvement furnished in said petition; that the said Board of County Commissioners did not fix a time and place for a hearing of said petition and did not give notice thereof in the manner provided by law; that none of the proceedings of the said Board of County Commissioners in the matter of the said drainage petition has been recorded and indexed in any book kept for that purpose in the office of the Auditor of said County of Minnehaha; that no drainage district for the
17 purpose of the construction of said spillway, dams, retaining gates, ditches and other work has ever been established other than the drainage district established as alleged in paragraph "Fifth" hereof.

Thirteenth.

That prior to the reconstruction of said spillway, dams, retaining gates, ditches and other work, the said Board of County Commissioners of Minnehaha County did not prepare plans and specifications therefor, and did not file plans or specifications therefor in the office of the County Auditor of the said County of Minnehaha, and did not let contracts upon competitive bids for the construction of said spillway, dams, retaining gates, ditches and other work; that prior to the reconstruction of said spillway the said Board of County Commissioners did advertise for competitive bids for the construction of the spillway in accordance with certain plans therefor; that bids were received by the said Board of County Commissioners for the construction of a spillway in accordance with such plans, and that the same were rejected by the said Board of County Commissioners, and subsequently the said Board of County Commissioners adopted a new and amended plan for the construction of an entirely different form of spillway, and without advertising for bids for such construction made a contract for the construction of said spillway in accordance with said new and amended plan with the Sioux Falls Construction Company, under which said contract the said Sioux Falls Construction Company constructed such spillway upon the cost plus plan; that under said contract the said Sioux Falls Construction Company was paid the entire cost of the construction of said spillway, together with nine

per cent (9%) of the total cost added; that the cost of the construction of said spillway under said cost plus plan was, as plaintiff is informed and believes, upwards of one hundred fifty thousand dollars (\$150,000.00) for which said sum drainage ditch warrants upon said drainage ditches No. 1 and No. 2 were issued by the said Board of County Commissioners of Minnehaha County to the said Sioux Falls Construction Company, and to other persons.

Fourteenth.

That on or about the 20th day of November, 1920, the Board of County Commissioners of said Minnehaha County entered into a certain contract with Albert J. Chenoweth and Herman Rettenhouse, co-partners as Chenoweth & Rettenhouse, whereby the said Board of County Commissioners employed the said Chenoweth & Rettenhouse to make a topographical survey showing the lands benefitted and subject to assessment for the payment of the cost of said spillway, dams, retaining gates, ditches and other work, and that by said contract the said Board of County Commissioners agreed to pay the said Chenoweth & Rettenhouse for said survey the sum of Seven thousand five hundred dollars (\$7,500.00) to be paid in drainage ditch warrants drawn on drainage ditches No. 1 and No. 2; that the said Chenoweth & Rettenhouse thereupon proceeded to make the purported survey of the lands purported to be subject to assessment for the construction of said spillway, dams, retaining gates, ditches and other work; that the said Chenoweth & Rettenhouse made and filed a report with the said Board of County Commissioners, in which report they made a purported proposed distribution of benefits; that a copy of said proposed distribution is hereunto annexed, marked "Exhibit B" and made a part hereof.

Fifteenth.

That on or about the 10th day of June, 1921, the said board of county commissioners of the said county of Minnehaha adopted a purported notice of the time and place for equalizing the proportion of benefits for the construction of said spillway, dams, retaining gates, ditches, and other work, and caused the same to be published on July 13th, 1921, and on July 20th, 1921, in the Sioux Falls Daily Argus Leader, the official newspaper of the said county of Minnehaha; that a copy of said drainage notice is hereunto annexed, marked "Exhibit C"; that the proportion of benefits assessed against the plaintiff is 616.85 units, out of a proposed total of 32,-

549.62 units, and that upon the basis of such apportionment the assessment against plaintiff and its property will be in excess of five thousand eight hundred dollars (\$5,800.00); that the said board of county commissioners of said Minnehaha County are threatening to and will, as plaintiff is informed and believes, unless enjoined by this court, make an apportionment of benefits upon plaintiff of 616.85 [unites], and will make an assessment thereon against plaintiff and its property in the sum in excess of five thousand eight hundred dollars (\$5,800.00), and that the defendant, Fred E. Ward, as county auditor of the said county of Minnehaha, will spread such assessment upon the books of his office, and that the defendant, J. O. Anderson, as treasurer of the said county of Minnehaha, will proceed to collect the same pursuant to the provisions of said purported statute, "Exhibit A".

Sixteenth.

That this action is a suit of a civil nature to resist and prevent an assessment upon the property of plaintiff under the pretended authority of a purported act of the Legislature of the state of South Dakota claimed by plaintiff to be in conflict with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States and that the amount in controversy herein exceeds, exclusive of interest and costs, the sum or value of three thousand dollars (\$3,000.00) and is the amount of said threatened assessment, to-wit: a sum in excess of five thousand eight hundred dollars (\$5,800.00).

Seventeenth.

That the costs of the board of county commissioners of said Minnehaha County in constructing said spillway, dams, retaining gates, and ditches, were unauthorized under the constitution and laws of the state of South Dakota, and that the same have never been approved by the State Engineer of the state of South Dakota; that no benefits have accrued to plaintiff or its property by the construction of said spillway, dams, retaining gates, and ditches, and by the other work done as aforesaid upon the property, in the drainage area of said drainage ditches No. 1 and No. 2, but that the same have been and are a positive damage to the property of plaintiff.

Eighteenth.

That said purported statute of the state of South Dakota, "Exhibit A" hereto, is unconstitutional and void, in that the

same is in violation of Section 2 of Article VI. of the Constitution of the State of South Dakota, and in that the same is in violation of the Fourteenth Amendment of the Constitution of the United States; that said Statute, "Exhibit A", is further void and unconstitutional in that the same provides no fixed and determinable method or rule for the apportionment of benefits upon the property and property owners situated within the drainage area, and especially in that said purported statute furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad companies and other corporations, and upon the property of municipal and quasi-municipal corporations, and upon platted property in cities and villages. Said purported law, "Exhibit A", is further unconstitutional and void in that the same provides for an assessment against property without the right of the property owner to be heard thereon and without notice of any character to the property owner; that if said apportionment of benefits be made as threatened by the said board of county commissioners of said Minnehaha County, and as is provided in said notice, "Exhibit C", the same will constitute the taking of the property of plaintiff and of the

21 other property owners affected by said notice without due process of law, and will deny and deprive plaintiff of the equal protection of the laws; that a cloud will be placed upon the title of the plaintiff to its real property situated within said drainage area affected and attempted to be established by said notice, "Exhibit C"; that there will result a multiplicity of suits; that plaintiff and other property owners affected will suffer immediate and irreparable injury; and that plaintiff has no plain, speedy, and adequate remedy at law.

Wherefore, plaintiff prays judgment that the defendants and each of them, their agents, servants, employes, attorneys, and successors in office, and each and every one of them, be forever restrained and enjoined from proceeding further in the making of an apportionment of benefits upon the property of plaintiff for the construction of said spillway, dams, retaining gates, ditches, and for the other work done, as aforesaid, by the board of county commissioners in the area of said drainage ditches No. 1 and No. 2 and restrained and enjoined from making any assessment upon the property of plaintiff for the cost of the construction of said spillway, dams, retaining gates, ditches, and other work, or any part thereof, and from proceeding in any manner under said purported statute, "Exhibit A" in the construction of any work in the

area of said drainage ditches No. 1 and No. 2 and from doing any act looking toward the apportionment of benefits for any work heretofore done in the area of said drainage ditches No. 1 and No. 2, and from doing any act tending towards the making of an assessment for the cost of any such work heretofore done, and from in any manner proceeding under said purported law, "Exhibit A", in the doing of any work in the area of said drainage ditches No. 1 and No. 2; that the defendant, Fred E. Ward, as auditor of the said county of Minnehaha, be forever restrained and enjoined from making

22 any apportionment of benefits for work done, as aforesaid in the area of said drainage ditches No. 1 and No. 2, and from making any assessment therefor, and from certifying any assessment therefor to the county treasurer of the said county of Minnehaha; that the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as county commissioners of the said county of Minnehaha, and their successors in office be forever restrained and enjoined from fixing a proportion of benefits for the construction of said spillway, dams, retaining gates and ditches upon the property of plaintiff and upon the property of the other property owners named in said notice, "Exhibit C", and forever restrained and enjoined from making any assessment against plaintiff, or its property, or against the property of any other property owner in the area of said drainage ditches No. 1 and No. 2 and for the cost of said work; that the defendant, J. O. Anderson, as treasurer of Minnehaha County, South Dakota, and his successors in office, be forever enjoined and restrained from filing any assessment and from collecting any assessment against the property of plaintiff, or of the other property owners named in said notice, "Exhibit C", upon any assessment for the construction of said spillway, dams, retaining gates and ditches; that the said purported statute of the state of South Dakota, "Exhibit A", hereto, be adjudged and decreed to be unconstitutional and void; that all acts of the board of county commissioners of said county of Minnehaha and of the state engineer of the state of South Dakota heretofore done in connection with the construction of said spillway, dams, retaining gates and ditches be adjudged and decreed to be illegal and void; that it be adjudged and decreed that no benefits have resulted to plaintiff from the construction of said spillway, dams, retaining gates, and ditches and that no apportionment of benefits or assessment of damages ever be made against plaintiff or its

23 property therefor.

That pending the issuance of a perpetual injunction herein, this Honorable Court grant an interlocutory injunction herein restraining the defendants herein, their agents, servants and employes and each and every of them from doing any of the above mentioned acts until the final hearing herein or until the further order of this court; that before the hearing and determination of plaintiff's application for an interlocutory injunction this Honorable Court grant a temporary restraining order restraining the said defendants, their agents and servants and each and every of them, from doing any of the above mentioned acts until the hearing and determination of plaintiff's application for an interlocutory injunction herein.

The plaintiff further prays that a subpoena of the United States of America issue out of and under the seal of this Honorable Court directed to the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, individually and as County Commissioners of the County of Minnehaha in the State of South Dakota, and to Fred E. Ward, individually and as auditor of the said county of Minnehaha, and to J. O. Arderson, individually and as Treasurer of the said County of Minnehaha, thereby commanding them and each of them on a day certain therein to be named to be and appear before this Honorable Court, and then and there to answer (but not under oath, answer under oath being hereby expressly waived) all and singular, the premises and to perform and abide by such order, direction or decree as may be made in the premises, and that on final hearing hereof said order of injunction may be made perpetual. Plaintiff further prays for such other and further relief as shall to Court seem just, proper and equitable, and for its costs and disbursements herein.

H. E. JUDGE,
Solicitor for Plaintiff.

.....
of Counsel.

24

Exhibit B.

Proposed Distribution of Proportional Benefits.

District or Division	Acres	Units	Percent of total.
1. Farm lands north of City Limits and North of South Line of Sec. 12-101-50	13,271.09	10862.30	33.4% \$103,191.85

2. City Lots and Town of Renner lying north of above line,	81.20	42.52	0.1%	403.94
3. Farm land and tracts south of above line,	2,065.23	2958.45	9.1%	28,105.28
4. City lots south of above line,	361.60	1372.52	4.2%	13,038.94
5. City of Sioux Falls,		3147.95	9.7%	29,905.52
6. Minnehaha County,		2518.36	7.7%	23,924.42
7. Township roads,		1573.98	4.8%	14,952.81
8. Railroads,		4721.91	14.5%	44,858.15
9. Northern States Power Company,		5351.63	16.5%	50,840.49
Totals,	15,722.12	32549.62	100.0%	\$309,221.40

In the above calculation the Value of One Unit is taken at \$9.50.

CHART

TOO

LARGE

FOR

FILMING

26 Endorsed: Filed in the District Court on Aug. 1, 1921, at 11 A. M.

27 (Order granting leave to Minnehaha National Bank of Sioux Falls et al., to intervene and be made parties defendant.)

The matter of hearing the show cause order heretofore issued out of this Court at the instance of the Minnehaha National Bank of Sioux Falls, South Dakota, et al, to the above named plaintiff and defendants in the above entitled cause, coming on regularly for hearing before this Court, at the court room thereof, in the Federal Building, in the City of Sioux Falls, South Dakota, the said plaintiff appearing by its attorneys of record, and the said petitioning interveners appearing by their attorneys, Porter & Bartlett, and after hearing of said matter, it is hereby

Ordered and Adjudged that the said Minnehaha National Bank of Sioux Falls, South Dakota, et al, said petitioning interveners, petition be granted, and the said Minnehaha Na-

tion Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson,

28 South Dakota, Savings Bank of Hartford, South Dakota, The Colton State Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, the Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Security Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, H. E. Donahoe, and W. G. Porter, be and they are hereby made parties defendant to this cause of action, and they are hereby given until the 25th day of August, 1921, at Ten o'clock A. M. thereof, within which time to file their answer to plaintiff's bill of complaint herein, and to make a return to plaintiff's show cause order herein.

And good cause appearing therefor, it is further likewise Ordered that the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock as County Commissioners of Minnehaha County, South Da-

kota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, have and they are hereby granted until August 25th, 1921 at Ten o'clock A. M. to file their answers to plaintiff's bill herein, and to make a return to plaintiff's show cause order herein.

And it is further Ordered that the hearing of said show cause order be and the same is hereby adjourned to August 25th, 1921, at Ten O'clock A. M.

Dated this 11th day of August, A. D. 1921.

By The Court:

(Seal of Court)

JAS. D. ELLIOTT,
Judge of the District Court.

Attest:

Jerry Carleton,
Clerk of the District Court.

Endorsed: Filed in the District Court on Aug. 19,
29 1921, at 2 P. M.

And afterwards, to-wit, on the 1st day of September A. D. 1921, there was filed in the office of the clerk of said court, Answer of Defendants; that the Title of the Case, Paragraphs A, B, C, D and F of defendants' Special Answer, Paragraph First to Eighteenth, inclusive, of the defendants' General Answer, Paragraphs I, VII, VIII, IX, XII, XIII, XIV and XV of defendants' Affirmative Defense, the Prayer, Petition of F. L. Blackman and others to reconstruct and improve drainage ditches No. 1 and 2, the Order for filing said Petition, the Resolution for survey under said Petition, the Resolution fixing the exact line and width of the ditch and fixing the time and place for hearing said petition, and the Resolution establishing Drainage Ditch No. 1 and 2, all as contained in said Answer of Defendants, are in words and figures the following, to-wit:

30

(Answer.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

Great Northern Railway Company, Plaintiff,

vs.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as

Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe, W. G. Porter, Intervening Defendants.

Comes now the above named defendants, A. G. Risty, et al., and for their answer to plaintiff's bill of complaint in the above entitled action, admit, deny and allege as follows:

A.

The above named defendants, A. G. Risty, et al, for their answer to plaintiff's bill of complaint, allege that said bill does not state any matter of equity entitling plaintiff
31 to the relief prayed for, nor are the facts as stated, sufficient to entitle plaintiff to any relief against the said defendants in that said plaintiff has a plain, adequate and complete remedy at law.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

B.

The above named defendants, A. G. Risty, et al, for their answer to plaintiff's bill of complaint and the allegations contained in paragraph eighteen thereof, to-wit: "That there will result a multiplicity of suits and that the owners affected will suffer irreparable injury", are not truly stated or alleged in good faith and are stated with the false and fraudulent purpose of imposing upon the jurisdiction of this court and they are therefore fictitious and fraudulent. And said defendants say there are no other actions at law or in

equity pending or threatened against said plaintiff and that said plaintiff has a plain, adequate and complete remedy at law, all of which these defendants allege to be true and plead the same in bar to said bill.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

C.

The above named defendants, A. G. Risty, et al, for answer to plaintiff's bill of complaint, allege that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this Court in that this suit is wholly based upon the alleged existence of a federal question and diversity of citizenship, and that the amount sued for and the value of the subject matter as alleged in said bill is not truly stated or alleged in good faith. That 32 the allegations of plaintiff's bill show it as being "a suit of a civil nature to resist and prevent an assessment upon the property of this plaintiff under the pretended authority of a purported act of the legislature of the State of South Dakota, claimed by plaintiff to be in conflict with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and that the amount in controversy herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00) and is the amount of the threatened assessment, to-wit: a sum in excess of Fifty-eight Hundred Dollars (\$5800.00)", are false and stated with a false and fraudulent purpose of imposing upon the jurisdiction of this Court and are therefore fictitious and fraudulent. And said defendants say that the amount involved, or value of the subject matter in this suit, does not exceed the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs; that said bill of complaint upon its face shows that under the drainage law referred to in paragraph four thereof the amount of the assessment, or the amount in controversy herein, has not been, and cannot be, determined until after the equalization thereof provided for in such statute and until such equalization, the amount to be hereinafter assessed, if any, by said Board of County Commissioners or by the Courts of the State of South Dakota, to which an appeal is taken, as provided for by said law is purely speculative, is uncertain and undeterminable at this time by said plaintiff, this court, or anyone at all, and is dependent entirely upon the showing made by this plaintiff at such hearings and determinations provided for by said law, as to the amount of benefits re-

ceived by this plaintiff; and that no sum has been or can be assessed and determined against the plaintiff's property until such equalization of the proportion of benefits has
33 been had, and at which hearings this plaintiff is permitted to make his showing therein and the amount of benefits, if any, which plaintiff does receive are thereafter equalized and fixed by said Board or Court and the amount so fixed is then extended and assessed against the property of said plaintiff, and not otherwise, all of which these defendants aver to be true and set up the same in bar of plaintiff's bill of complaint herein.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

D.

The above named defendants, A. G. Risty, et al, for answer to plaintiff's bill of complaint herein, allege that on or about December 4, 1920, an equity suit was instituted in the Circuit Court within and for Minnehaha County, in the State of South Dakota, the same being a Court of general jurisdiction and having jurisdiction over the subject matter there presented by one Oluf O. Gilseth, whose lands are affected by the construction of drainage ditch No. 1 & 2 and against which lands the proportion of benefits for the construction of said ditch has been proportioned upon the same basis and in like manner as the proportion of benefits upon the lands of this plaintiff as hereinafter set forth, which action was brought by the said Oluf O. Gilseth, for himself and as representing an informal organization of farmers and others who are similarly situated, against the defendants herein, the Board of County Commissioners of Minnehaha County, South Dakota, and other persons, which action was instituted with full knowledge, approval, acquiescence and consent of the plaintiff herein, its officers, agents and attorneys, and in which said cause the same facts are alleged and relied on in plaintiff's bill of complaint as herein set forth, and which
34 said bill of complaint prayed that said defendants be forever enjoined and restrained from making or attempting to make any proportion of benefits upon the property of the plaintiffs herein, or the property of other property owners within the drainage area of the drainage ditches No. 1 and No. 2 for the costs and construction of said spillway, dams, retaining gates or other work, and be forever restrained and enjoined from levying any assessment upon the property of the plaintiff or upon the property of

other property owners in said drainage area for the payment of the costs of the construction of said spillway, dams, retaining gates or other work, for the reason and upon the grounds that the law under which said drainage ditch was established and constructed was in controvention of the due process of law clause in the Fourteenth Amendment of the Constitution of the United States, to which said bill of complaint said defendant Board of County Commissioners and these intervening defendants set up and relied upon the same facts and defense as are hereinafter set forth; that said action came on for trial before said Circuit Court of Minnehaha County, South Dakota, with the full knowledge, acquiescence, consent and approval of plaintiff and at which trial plaintiff was entitled to be heard and was represented by its attorneys on the 31st day of January 1921, evidence was introduced upon said hearing on behalf of said plaintiff and these defendants and after the taking of evidence therein was closed and thereafter upon the facts there presented, and in the trial of which the plaintiff could have and did participate, said Court made findings and conclusions and judgment thereon dismissing said action upon its merits. That a duly exemplified copy of said bill of complaint, answer, findings, conclusions and judgments are hereto attached, marked "Exhibit B", and made a part hereof, all of which these defendants allege to be true and plead the same in bar.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

* * * * *

35

F.

Comes now the above named defendants, A. G. Risty, et al, and for answer to plaintiff's bill allege that this suit does not really and substantially involve a controversy within the jurisdiction of this court, in that this suit involves the determination of facts and matters controlled and governed by the drainage statute of South Dakota, mentioned in plaintiff's bill of complaint and which by its provisions creates and provides its own special tribunal with exclusive original jurisdiction to try and determine the questions necessarily involved therein, and which are attempted to be presented for litigation in this action, and that, until such determination by said special tribunal so provided for, this court has no jurisdiction over the subject matter set forth in plaintiff's bill of complaint, and that said special tribunal has not fully determined the matters and things herein presented for determination.

All of which these defendants allege to be true and plead the same to the jurisdiction of this Court.

Wherefore, defendants pray that plaintiff's bill of complaint be dismissed with costs.

G.

Comes now the above named defendants, A. G. Risty, et al, and for their further answer to the allegations contained in plaintiff's bill of complaint, admit, deny and allege as follows:

First.

That these defendants admit Paragraph I of said bill.

Second.

That these defendants admit Paragraph II of said bill.

Third.

That these defendants admit Paragraph III of said bill.

36

Fourth:

These defendants, answering said bill of complaint, admit that the Legislature of the State of South Dakota, at its Tenth Session enacted a law entitled: "An Act for the Establishment, Construction and Maintenance of Drainage and Levies in Counties, Whenever such Drainage shall be Conducive to the Public Health, Convenience or Welfare, or Whenever it shall be Necessary or Practicable for the Drainage of Agricultural Lands", which law was approved by the Governor of the State of South Dakota on February 21st, 1907, said law being Chapter 134 of the Session Laws of South Dakota of 1907, and that subsequently thereto, the Legislature of the State of South Dakota, in the years 1909, 1911, 1915 and 1917, enacted laws amendatory thereto, and in 1919 re-enacted said law and amendments thereto, as Sections 8458, to 8491, inclusive, of the South Dakota Revised Code for 1919, and thereafter and in the years 1920 and 1921, enacted amendments thereto, which law and amendments now constitute the drainage laws of the State of South Dakota, and specifically deny each and every other allegation of said paragraph.

Fifth.

These defendants answering the Fifth paragraph of complainant's bill, deny that the Board of County Commissioners of Minnehaha County, South Dakota,

established a drainage ditch known as "Drainage Ditch No. 1 and No. 2", as therein alleged, but allege the fact to be that in the year 1907 the Board of County Commissioners of Minnehaha County, upon the petition of William H. Lyon, accom-

37 panied by a proper bond, approved by the County Auditor, and after due notice and other procedure pursuant to and under Chapter 134 of the Laws of 1907 of the State of South Dakota, established Drainage Ditch No. 1 commencing at a point named in the Southeast Quarter ($SE\frac{1}{4}$) of Section Twenty-nine (29), Township One Hundred two (102), Range Forty-nine (49), running thence about two (2) miles directly South, thence in a Southeasterly course about a mile, cutting through the rim of the natural ridge or bluff just North and East of the State Penitentiary in the City of Sioux Falls, and descending about one hundred (100) feet following the slope of the hill, and terminating in the Big Sioux River on the Northeast Quarter ($NE\frac{1}{4}$) of Section Nine (9), Township One Hundred One (101), Range Forty-nine (49), which said drainage ditch was constructed so as to have a bottom width of forty (40) feet, except where the same cut through the bluff and descended into the Big Sioux River, where a thinly lined concrete gutter or spillway, with sufficient capacity only to carry the water that was planned to come through the said ditch, was constructed, but the terminal thereof was never safely or securely anchored and established, and that thereafter and before the construction of said Drainage Ditch No. 1 had been completed, one Iver R. Peterson and numerous other persons, filed their petition in regular form, accompanied by a proper bond duly approved by the County Auditor, with said Board of County Commissioners, asking and praying that the said Drainage Ditch No. 1 be extended Northward several miles through the Valley of the Big Sioux River, to drain other agricultural lands therein situated; the said petition was found sufficient in form, and was ordered filed and referred to the State Engineer, and a resolution for survey regularly adopted thereon, and thereafter, and

38 upon the Engineer's written report of said survey, by resolution, the exact line and width of said ditch extension was fixed, and after due notice and hearing, said petition was allowed, and resolution adopted by the Board of County Commissioners establishing said drainage ditch, and designating it as "Drainage Ditch No. 2", extending from the North end of Drainage Ditch No. 1, hereinbefore described, Northward about twelve (12) miles to a point near the Northeast Corner of Section Thirty-one (31) in Dell Rapids Township, and said drainage ditch was thereafter constructed,

which ditch so constructed, tapped the Big Sioux River in two places, and the assessment for the costs and expense of the construction thereof was duly spread upon the lands benefited within the territory embraced within the initial point in Dell Rapids Township, and the terminal point in Section Nine (9) of Sioux Falls Township; and further answering said Paragraph V, these defendants admit that prior to the year 1916 assessments were duly spread upon the lands determined to be benefited by the construction thereof, and such assessments collected, but deny each and every other allegation in said paragraph contained.

Sixth.

These defendants answering the sixth paragraph of complainant's bill, admit the allegation contained in said paragraph, but allege the fact to be that in addition to the lands drained lying North of the City of Sioux Falls, the said Drainage Ditches No. 1 and No. 2 also drained, affected and benefited lands lying West and South of said City and also the lands adjacent to said River through and in said City of Sioux Falls were drained, affected and benefited thereby.

Seventh.

These defendants answering the Seventh paragraph of the complainant's bill, allege that they are without knowledge as to the facts therein set out, and therefore deny the same.

Eighth.

These defendants further answering the Eighth paragraph of complainant's bill, admit that the plaintiff is a corporation engaged in the operation of a line of railroad in the
39 said County of Minnehaha, but specifically deny each and every other allegation, matter, and thing in said paragraph contained.

Ninth.

These defendants answering the Ninth paragraph of complainant's bill, admit the statements therein made, but in explanation thereof, allege the further facts to be that after the construction of said spillway, as above described, the capacity of said ditches were increased by the rapidly flowing waters therein, eroding the banks and widening said Ditch No. 1 to nearly twice its original width of forty feet: the natural barrier which originally prevented the waters of the Big Sioux River from flowing into said Ditch No. 1 near its initial point,

except in flood times, eroded and wore away and permitted a large part of the water from the Big Sioux River to flow uncontrolled directly into said ditch and through the same to said spillway, which said spillway did not have the capacity to safely carry all of the flood waters that came to it through said ditch; that by reason of the foregoing facts said ditches became out of repair, and filled with sand bars and mud, and other obstructions, and that, owing to the tortuous course of the Big Sioux River through the district drained by said Ditches No. 1 and No. 2, the said river and said ditches were inadequate to carry away the flood waters and properly drain the lands within the area of said drainage ditches during flood seasons; that on or about the 15th day of March, 1916, during a spring flood, said spillway and outlet for said drainage ditches, as above described, was washed out and destroyed, so that the waters passing through said ditches and outlet, were wholly uncontrolled; that at the place where said spillway had been constructed, the waters descended to the basin of the Big Sioux River over a steep bluff by a drop of approximately of the height of one hundred feet, and that after the washing out and destruction of said spillway and outlet, the waters from said ditches washed out a deep gorge in the bluff, and tore away and destroyed the adjacent land to the extent of several acres; that said outlet and spillway were located in the immediate vicinity of State lands belonging to the State of South Dakota, and in the immediate vicinity of the State Penitentiary, and also of the City Water Works of the City of Sioux Falls, by means of which water works the said City was supplied with water from gravel beds immediately adjacent to said drainage ditches, and that by reason of the washing out of said spillway and of the uncontrolled waters of said ditches, the said lands of the State of South Dakota, the State Penitentiary and the water works and water supply of the said City of Sioux Falls, as well as the properties of private citizens in the vicinity of said outlet and spillway, were greatly imperiled and endangered; that there was imminent danger of the waters of the Big Sioux River being entirely diverted from their natural course into Drainage Ditch No. 1 and through the said spillway and outlet, and the water power of the Big Sioux River immediately above the mouth of said drainage ditches thereby destroyed, to the great and irreparable damage of many private property owners.

Tenth.

These defendants answering the Tenth paragraph of the complainant's bill, hereby specifically deny the same, and each and every allegation thereof, and in explanation of the facts attempted to be therein set out, allege that upon the occurrence of the destruction of the original spillway as
41 hereinbefore set out in the Ninth paragraph hereof, that thereupon the Board of County Commissioners of said Minnehaha County took immediate steps to control the said waters coming through said drainage ditches, by means of dams across said drainage ditches above said spillway, and by driving piling therein, and were so employed when, on or about the 21st day of March, 1916, one Charles Kaufmann, and other persons owning property within the area of said Drainage Ditch No. 2, brought an action in the Circuit Court of Minnehaha County, South Dakota, to restrain said Board from so proceeding to control the waters of said drainage ditches, and obtained an order against said Board, requiring them to show cause why an injunction should not be granted, which said order came on for hearing before the said Court on the 25th day of March, 1916, and the said Court thereupon denied said application for said temporary injunction, whereupon said action was dismissed, the same being Circuit Court File of Minnehaha County No. 15708, which is hereby referred to and made a part hereof.

That on or about April 1, 1916, and because of the conditions above described, the plaintiff in the last mentioned suit and a large number of his neighbors, similarly situated and affected by said drainage ditches perfected an informal local organization and appointed a committee of eight members to look after their interests with reference to repairing said drainage ditches, and to urge before the Board of County Commissioners, such improvements as seemed advisable.

That thereafter and on or about the 8th day of April, 1916, several persons representing said local organization or committee, including some of the said plaintiffs in said last mentioned suit, filed a petition and bond with the said Board of County Commissioners praying that the outlet and spillway to said drainage ditches as originally established and constructed, be closed up and abandoned, and that a new outlet for said ditches be provided by diverting the waters thereof at a point above said spillway, as originally constructed, in a Westerly direction through Covell's Lake,

and thence back into the Big Sioux River above the said City of Sioux Falls, upon which said petition the said Board caused a survey to be made, with the approval of the State Engineer, and a surveyor's report to be filed, and a hearing had upon said petition, after notice, as required by law upon which hearing numerous property owners within the territory affected thereby, appeared before said Board and filed objections to the said proposed proceedings, and filed numerous large claims for damages by reason of said proposed change of outlet, and that upon said hearing, on July 8th, 1916, said Board made an order allowing the prayer of said petition, and established said Covell's Lake outlet, and abandoned said outlet and spillway as originally established and constructed; that thereupon numerous conferences were

42 had between the petitioners in said proceeding last above referred to, and the said objectors and property owners owning lands within the area of said Drainage Ditches No. 1 and No. 2, and that it was agreed at said conferences that the proceedings upon said petition last above referred to should be abandoned, and the same were abandoned accordingly, and that a new petition should be filed and new proceedings instituted for the re-establishment of said Drainage Ditches No. 1 and No. 2 and the reconstruction and improvement thereof, and the re-establishment and the reconstruction of the outlet to said ditches, and for the establishment and construction of a new spillway to properly control and take care of the waters flowing through said drainage ditches, and for the enlargement of said drainage district so as to embrace all of the property benefited thereby, extending from the Northern end of said territory included in said Drainage Ditches No. 1 and No. 2, following the course of the Big Sioux River around the City of Sioux Falls, and extending as far down said river as the mouth of said spillway and outlet to said drainage ditches, where the waters thereof were discharged into the Big Sioux River, below the said City of Sioux Falls, and that thereafter, and in accordance with said agreement, and with the consent and acquiescence of this plaintiff, a new drainage petition and bond, approved by the County Auditor, were filed with the Board of County Commissioners, by the City of Sioux Falls, F. L. Blackman, and other persons who owned lands within the area of and that was assessed for the cost of construction of said Drainage Ditches No. 1 and No. 2, praying for the establishment and construction of a new drainage ditch in the exact location of said original ditches, and the re-establishment and construction of a substantial spillway and outlet there-

for, together with several cut-offs or ditches, straightening and canalizing the channel of the Big Sioux River adjacent thereto, so as to improve and increase its carrying capacity, and praying that the assessment area be increased to cover said new territory benefited, pursuant to said agreement, which said petition being found sufficient in form by said Board of County Commissioners, was, on August 3, 1916, ordered filed and referred to the State Engineer, who, with the said Board of County Commissioners, on August 4, 1916, inspected the route of said drainage, and had several conferences with the said persons interested as aforesaid, including this plaintiff, and authorized and ordered a survey to be made by Engineer L. E. Stevens, under the supervision of the State Engineer, which said survey was accordingly made by said L. E. Stevens, who, on September 13, 1916, filed his written report with said petition, and thereupon the said Board of County Commissioners fixed the exact route and width of said drainage, and the time and place of hearing thereon, and caused notice of hearing to be given according to law and upon the return date fixed in said notice, after due hearing, and upon the approval and advice of the State Engineer, and without objection upon the part of the plaintiff herein, or any other person. upon October 3, 1916 found said proposed drainage, as petitioned for, to be conducive to the public health, convenience and welfare, and necessary and practicable for draining agricultural lands, and thereupon, by resolution duly adopted, re-established said drainage ditch in the exact location of the original ditches, and fixed the damages caused by the construction thereof, and designated it as "Drainage Ditch No. 1 & 2", and no appeal was taken from such order establishing said "Drainage Ditch No. 1 & 2", and said order so establishing said Drainage Ditch No. 1 & 2 is now in full force and effect.

Eleventh.

These defendants answering the Eleventh paragraph of the complainant's bill, admit that the Board of County Commissioners of Minnehaha County have expended approximately Two Hundred and Fifty-five Thousand Dollars (\$255,000.00) in, payment for work done and material furnished in the construction of ditches, dams, gateways and the spillway upon said Drainage Ditch No. 1 and 2, for which drainage ditch warrants upon Drainage Ditch No. 1 and 2 Fund have been issued, payable only out of the assessments to be hereafter levied upon the lands and properties benefited by the construction of said ditch, and there

is now due thereon, for principal and interest, about Two Hundred and Ninety Thousand Dollars (\$290,000.00) and hereby specifically deny each and every other allegation in said paragraph contained, but further allege that the drainage warrants above referred to were issued, only upon duly verified claims, duly presented, audited and allowed by the County Commissioners, and report of the allowance of the same duly published in said Commissioners' proceedings, as provided by law.

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Twelfth.

These defendants answering the Twelfth paragraph of complainant's bill, hereby admit that on or about the 3rd day of August, 1916, a petition was filed in the office of the County Auditor of the County of Minnehaha, duly signed by the City of Sioux Falls, by George W. Burnside, its Mayor, and duly attested by Walter C. Leyse, City Auditor, F. L. Blackman, and others, which petition was for the purpose of re-constructing and improving Drainage Ditches No. 1 and No. 2, in Minnehaha County, South Dakota, and to construct a new spillway and outlet to Drainage Ditches No. 1 and No. 2, and to pay therefor by assessments upon the property, persons and corporations benefited thereby, but these defendants specifically deny each and every other allegation, matter and thing contained in said Twelfth paragraph, but allege the facts to be as stated and set forth in the Tenth paragraph of this Answer, and further allege that all acts negatived in said paragraph Twelve, were duly taken, done and performed, upon due notice, as required by the laws of the State of South Dakota.

Thirteenth.

These defendants answering the Thirteenth paragraph of complainant's bill, hereby specifically deny each and every allegation in said paragraph contained, as therein alleged, and allege the facts in relation thereto to be as follows: That immediately after the establishment of "Drainage Ditch No. 1 & 2", as hereinbefore described, the said Board of County Commissioners, acting under said newly established Drainage Ditch No. 1 & 2, proceeded to dike, clean out, enlarge and re-construct original Drainage Ditches No. 1 and No. 2, and the additional river cut-offs were constructed, and the outlet and spillway of said drainage ditches re-built in a more substantial and permanent manner, upon plans approved by

the State Engineer; that in the course of the construction of said spillway, plans were prepared under the supervision of the State Engineer, and approved by him on May 7, 1917, and bids for the construction thereof asked for by legal notice, and upon the opening of said bids and a consideration thereof, it was, by resolution of the Board, determined that the "spillway for which bids have been received for 'Drainage Ditch No. 1 & 2' can be constructed for less money than the amount of any bid submitted therefor", and it was "therefore ordered that the Board of County Commissioners cause such spillway to be constructed, hire the necessary labor, machinery, tools and appliances, and a superintendent to oversee the construction thereof, and purchase all necessary material for such construction, without letting a contract for the entire construction thereof", and the Board thereupon proceeded to construct said spillway in accordance with said determination, ordered the necessary material for the construction thereof, and employed the Sioux Falls

46 Construction Company to furnish the necessary labor, superintendent and supervision of the construction thereof, and to furnish the necessary machinery, tools, etc, to be used in said construction.

From the determination of the Board that it would build said spillway without letting a contract therefor, and by buying the necessary material therefor, and employing the Sioux Falls Construction Company to furnish the necessary labor, machinery, tools, superintendent and supervision thereof, one William H. Lyon, being the original petitioner in the construction of original Drainage Ditch No. 1, appealed to the Circuit Court of Minnehaha County, South Dakota, which appeal came on for hearing before the Court on the 14th day of July, A. D. 1917, and the court, after full hearing and consideration of the evidence introduced on behalf of the appellant and the Board, dismissed said appeal, holding that it appeared that the "decision appealed from is one that rests in the sound judgment of the Board of County Commissioners, and is not a proper subject for review by the Court"; that the proceedings upon said appeal are contained in File No. 16405 of the Circuit Court of Minnehaha County, South Dakota, which file and proceedings are hereby referred to and made a part hereof.

That thereupon the said spillway and outlet to said Drainage Ditch No. 1 & 2 was immediately re-constructed in a more substantial manner in accordance with the determination of said Board of County Commissioners, under the supervision

of the State Engineer of the State of South Dakota, at a cost of more than One Hundred Thousand Dollars (\$100,000.00); that the soil at the place where said outlet and spillway are constructed is of peculiar formation; that beneath the
47 surface at said point are found deep quicksands, the extent of which was at said time unknown to said Board of County Commissioners; that by reason of the necessity for immediate action in the construction of said spillway, and on account of the difficulties to be encountered in the construction thereof, it was impossible to prepare fully completed working plans at the time said work was commenced, but that the working plans had to be modified and adapted to the difficulties encountered as the work progressed, and that thereupon and by reason thereof, and with the approval and under the supervision of the State Engineer, the said Board of County Commissioners employed one F. C. Shenehon, a competent civil and [hýdraulic] engineer, to prepare working plans and to superintend the construction of said spillway as the work progressed, and that said working plans were so prepared by said Shenehon, and said spillway re-constructed under his immediate supervision and the supervision and approval of the State Engineer, in a substantial and adequate manner, and that the same, as so constructed, has ever since said time been in operation, and for the past three years has safely controlled and cared for the waters flowing through said drainage ditches, and protected the properties adjacent thereto, as aforesaid, from injury and damage by reason of the said waters, and the same is now in successful operation.

These defendants further allege that the records and proceedings in the establishment and construction of Drainage Ditch No. 1 & 2, on the petition of F. L. Blackman, the city of Sioux Falls, and other persons, referred to in Paragraph Fifth hereof, except the lengthy notices, are hereunto annexed, marked Exhibit "A", and made a part hereof, and that all of said proceedings were taken and had after due and legal notice, as required by law, which notice specifically named the plaintiff herein, and cited it to show cause why said drainage ditch should not be constructed as petitioned
for.

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Fourteenth.

These defendants answering the Fourteenth paragraph of complainant's bill, hereby specifically admit the facts therein set out, except the allegations that said "Chenoweth & Rettinghouse were to be paid in Drainage ditch warrants

drawn on Drainage Ditch No. 1 and No. 2", and except the further allegation that they "made a purported proposed distribution of benefits; that a copy of said proposed distribution is hereto annexed, marked Exhibit "B", and made a part hereof", which allegations are hereby specifically denied, and the facts are alleged to be that the said Chenoweth & Rettinghouse were paid in drainage warrants drawn on Drainage Ditch No. 1 & 2 Fund, and that said Exhibit "B" referred to, is merely an analysis or resume or deduction drawn from the facts set out in the report, merely for the purpose of showing the results shown by the proportion of benefits recommended.

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Fifteenth.

These defendants answering the Fifteenth paragraph of complainant's bill, deny that said Board of County Commissioners, on the 10th day of June, 1921, adopted a purported notice of time and place of equalizing the proportioning of benefits for the construction of said spillway, etc., as therein alleged, but allege the fact to be that for the purpose of making a proper and accurate assessment of the proportion of benefits among the lands affected within the said area drained by said Drainage Ditch No. 1 & 2, the defendants, the County Commissioners, have caused to be made a topographical survey of said drainage district, upon which to base an assessment, for the purpose of producing the necessary funds with which to pay the certificates of indebtedness, or drainage warrants, heretofore issued in the sum of about Two Hundred and Fifty-five Thousand Dollars (\$255,000.00), in payment of the labor, material, etc., used in said drainage work, as hereinbefore described, and have carefully gone over and inspected the whole area of said drainage district, and the lands affected thereby, and after such inspection and a full and careful consideration thereof, the said defendants, the Board of County Commissioners, did, on the 10th day of June, 1921, by resolution duly adopted and filed in said proceedings, fix the proportion of benefits among the lands affected, including the City of Sioux Falls, the various railroads and townships, according to the best judgment of said Board, taking into consideration the direct and indirect benefits that accrue by the construction of said drainage, taking a particular tract as a unit for comparison, after determining the extent of the benefit to said unit, and considering and fixing the proportion to all lands and properties affected upon the same basis, but that the benefits so fixed and determined do not more than equal fifty

per cent., of the benefits actually received by each of the lands and properties affected, in the judgment of said Board, and said determination is now in full force and effect; that in said resolution the time and place of equalizing assessment was fixed, and notice of said equalization of benefits has been given, according to law, to this plaintiff, at which time and place, the apportionment fixed as to the plaintiff's property and other property, will be equalized, and the assessment will be later extended and spread on said equalization, but the defendants have no knowledge of the total number of units or sum in dollars that will finally be equalized and assessed against said plaintiff's property. The defendants further allege that the notice, in addition to being published, as stated, was also posted according to law, and deny the balance of said paragraph.

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Sixteenth.

These defendants answering the Sixteenth paragraph of complainant's bill, specifically deny the same.

Seventeenth.

These defendants answering the Seventeenth paragraph of complainant's bill, specifically deny the same, and each and every allegation thereof.

Eighteenth.

These defendants answering the Eighteenth paragraph of complainant's bill, specifically deny the same, and each and every allegation thereof.

These defendants further answering complainant's said bill, and by way of affirmative defense, allege:

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I.

That said proceedings of the said Board of County Commissioners so taken and had in the establishment and construction of said Drainage Ditches No. 1 and No. 2, and in the assessment and equalization of the proportion of benefits, and in the assessment of the cost thereof upon the lands benefitted thereby, were taken and had after due and legal notice as required by law, and that said ditches were so established and constructed in accordance with said proceedings.

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VII.

These defendants further allege that in the assessment of Drainage Ditch No. 2, hereinbefore referred to, resolutions

were adopted assessing and equalizing the proportion of benefits thereunder upon and including all of the land assessed for the construction of Drainage Ditch No. 1, and other lands, including the lands and property rights of the plaintiff herein, but making due allowance for the assessment already made upon the lands within the area of the original district of Drainage Ditch No. 1 thereby treating and consolidating said two ditches as Drainage Ditch No. 2; that all of the proceedings herein referred to required to be recorded and indexed in a book kept for that purpose in the County Auditor's office, were so recorded and indexed.

VIII.

And the defendants, further answering complainant's bill, admit that they entered into a contract with Chenoweth & Rettinghouse, civil engineers, to make and perfect a topographical survey of all the lands lying between the City of Dell Rapids and the outlet to said spillway and drainage ditch, lying within the valley of the Big Sioux River, and that said survey was necessary and was made in order that said defendant Board might advisedly make an apportionment of and fix the benefits to the lands and properties affected by reason of the benefits derived by said plaintiff and others like situated, by reason of the diking, cleaning out, reconstruction and improvement made upon said drainage ditch, the river cut-offs and new spillway and outlet to said ditches; and further allege that the original petition for said drainage ditch, river cut-offs and spillway, hereinbefore mentioned, was a compromise between the said petitioners therefor and others affected thereby, as hereinbefore set forth, and that the making and filing of said petition, accompanied by a bond, as provided by law, which was duly approved by the County Auditor of Minnehaha County, South Dakota, transmission of a copy thereof to the State Engineer, the inspection of the proposed route of said drainage project, the causing and ordering of a survey thereof to be made by a competent surveyor under the supervision of said State Engineer, the surveyor's report thereon, the filing of the same by the Board with said petition, said Board's determination of the exact length and line and width of said drainage improvement, and the order and resolution of said Board fixing a time and place for hearing said petition, and the giving of notice thereof, the establishment of said drainage district and project by resolution and order of said Board upon said hearing, and the subsequent notice given to all parties interested, of the establishment of the cut-off

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ditches, including the plaintiff herein, and the final establishment thereof, and all work done and performed upon said ditches and river cut-offs ditches, and the establishment and construction of said spillway and work done thereon, and the manner of doing the same, and all other work done and performed upon said drainage ditch, cut-offs and spillway, were done and performed by said defendant Board, with the notice, actual knowledge, acquiescence, approval and consent of the plaintiff herein, its officers, agents and servants, and all others like situated, and said plaintiff and all others like situated during all the time said ditch, river cut-offs and spillway were being established, layed out and constructed, had notice and actual knowledge that payment therefor was to be made by special assessments against the lands and properties of said plaintiff affected thereby, and the lands of others like situated, and that there was no other provision of law or method of making such payment, and said plaintiff and none other of said parties took any legal steps to stop or prevent the establishment of, or work performed upon said ditches, river cut-offs or spillway, or the issuance of certificates of indebtedness or drainage warrants therefor, which said parties had notice and actual knowledge of, were to be taken up and paid only by said special assessments as aforesaid; and that said plaintiff and others like situated are now, and since 1918 have been receiving large and continuing benefits to their lands and properties affected, by reason of said reconstruction and construction of said drainage ditch, river cut-offs and spillway, under the said re-establishment as Drainage Ditch No. 1 & 2.

IX.

These defendants further allege, as special instances of the notice, knowledge, approval and co-operation of the plaintiff with these defendants, as the Board of County Commissioners, in proceeding with the work of establishing, re-constructing and constructing said Drainage Ditch No. 1 & 2, its dams, dikes, spillway and controlling works, that said plaintiff was specially summoned in the notice dated September 15, 1916, to show cause why said Drainage Ditch should not be re-established and constructed; that its agents and servants knew of the destruction of the old spillway, as originally constructed; that by special arrangement, the plaintiff hauled and delivered all of the cement, crushed rock, sand, re-inforcing iron, etc, used in the construction of the spillway on Drainage Ditch No. 1 & 2, on its spur extending to near the said spillway, just Northeast of the State Penitentiary; that said plain-

tiff hauled, and, by special arrangement, delivered one of the dredges used in cleaning and diking said drainage ditch, on its siding near said ditch and just West of the Penitentiary; that the said Drainage Ditch No. 1 & 2, where some of said cleaning and diking was done, is within plain view from the trains of plaintiff company going North from Sioux

55 Falls, and the officers, and agents of said plaintiff saw and knew of the work being done toward diking, cleaning and repairing said ditch, and the construction of said spillway, dams, gates and controlling works, during several months in the years 1917 and 1918.

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XII.

That by reason of each and all of the foregoing facts, acts and resolutions and orders done, passed and performed as hereinbefore set forth, the said plaintiff and all others like situated are now estopped and forever barred from in any manner claiming or asserting any right or relief herein, or at all.

XIII.

That in pursuance of said resolutions and orders hereinbefore referred to and set forth, and for the purpose of making a proper and accurate assessment of the proportion of benefits among the lands affected within the said area drained by said Drainage Ditch No. 1 & 2, the defendants, the County Commissioners, have caused to be made a topographical survey of said drainage district, upon which to base an assessment, for the purpose of producing the necessary funds with which to pay the certificates of indebtedness, or drainage warrants, heretofore issued in the sum of about Two Hundred and Fifty-five Thousand Dollars (\$255,000.00), in payment of the labor, material, etc, used in said drainage work, as hereinbefore described, and have carefully gone over and inspected the whole area of said drainage district, and the lands affected thereby, and after such inspection and a full and careful consideration thereof, the said defendants, the Board of County Commissioners, did, on the 10th day of June, 1921 by resolution duly adopted and filed in said proceedings, fix the proportion of benefits among the lands affected, including the City of Sioux Falls, the various railroads and townships, according to the best judgment of said Board, taking into consideration the direct and indirect benefits that accrue by the construction of said drainage, taking a particular tract as a unit for com-

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parison, after determining the extent of the benefit to said unit, and considering and fixing the proportion to all lands and properties affected upon the same basis, but that the benefits so fixed and determined do not more than equal fifty per cent., of the benefits actually received by each of the lands and properties affected, in the judgment of said Board, and said determination is now in full force and effect; that in said resolution the time and place of equalizing assessment was fixed, and notice of said equalization of benefits has been given, according to law.

XIV.

The above named defendants, A. G. Risty, et al, further answering plaintiff's bill of complaint allege that heretofore and on and prior to October 3, 1916, due and legal notice was given to the plaintiff herein of the time and place appointed by the Board of County Commissioners of Minnehaha County, South Dakota, for claiming any damage by reason of the establishment, construction and reconstruction of drainage ditch No. 1 and 2 and that the plaintiff herein wholly failed and neglected to present to said Board of County Commissioners at said time and place, to-wit: October 3, 1916, any claim for damages therein, and that by reason thereof this plaintiff is now estopped and debarred from claiming or asserting herein any right, or claim to any damage by reason of the establishment, construction and reconstruction of drainage ditch No. 1 and 2.

XV.

The above named defendants, A. G. Risty, et al, for further answer to plaintiff's bill of complaint, allege that the plaintiff is not entitled to the aid of a court of equity herein, for
58 the reason that said plaintiff has failed, neglected and refused to tender or offer to tender herein the amount of the actual benefits received by it by reason of the establishment, construction and reconstruction of Drainage Ditch No. 1 and 2.

Wherefore, the defendants, above named, pray that the plaintiff's bill of complaint in said action be dismissed, with costs.

E. O. JONES,
L. E. WAGNER,
Solicitors for Defendants.

B. C. Matthews,
Of Counsel.

Exhibit "A"

Petition.

To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to Said Drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property, Persons and Corporations Benefitted Thereby.

To The Honorable Board of County Commissioners of Minnehaha County, South Dakota :

1. The undersigned petitioners respectively represent and show that they are all residents of Minnehaha County, South Dakota, and that each of them is the owner of certain lands and real property situate and lying in said county in the valley of the Big Sioux River and within the territory to be drained, protected and benefitted by the reconstruction and improvement of drainage ditches One and Two in said Minnehaha County, South Dakota, and by the construction of a new spillway or outlet to said drainage ditches numbers One and Two.

2. Your petitioners further represent and show that said drainage ditches Numbers One and Two were established for the purpose of draining agricultural lands in 1907 and 1910 respectively as appears from records of said proceedings in the office of the County Auditor of Minnehaha County, South Dakota, which are hereby referred to and made a part hereof.

3. Your petitioners further represent and show that the said Drainage Ditches Numbers One and Two and the outlet thereto as constructed were and are insufficient to accomplish the purpose for which they were constructed and were
60 and are insufficient to properly drain the agricultural lands within the districts or territory supposed to be drained thereby and insufficient for the drainage of other agricultural lands lying within the valley of the Big Sioux River above the mouth of the outlet to said Drainage Ditches Numbers One and Two and between the mouth of said outlet and the lands heretofore included within the assessment districts upon which the cost of the construction of said drainage ditches One and Two was imposed and insufficient as constructed to improve, promote and conserve the public health and welfare within said territory hereinbefore described above the mouth of the outlet to said ditches Numbers One and Two lying partly within the City of Sioux Falls, South Dakota, all of which said lands and property would be benefitted, drained

and protected by a proper reconstruction and improvement of said Ditches One and Two and by the construction of a new and proper spillway or outlet to the same by means whereof the public health and welfare within the area hereinbefore described and referred to above the mouth of the outlet to said ditches would be conserved and improved.

4. Your petitioners further represent that it is necessary for the drainage of agricultural lands within said drainage districts Numbers One and Two and also agricultural lands lying above the mouth of the spillway or outlet to said ditches and between the mouth thereof and the present boundaries of said drainage Ditches Numbers One and Two to reconstruct, deepen, widen and improve said drainage ditches One and Two and to construct a new outlet or spillway thereto and that the construction of such new outlet or spillway and the reconstruction and improvement of said Ditches One and Two would also be conducive to the public health, convenience and welfare of the
61 City of Sioux Falls, South Dakota, and also of the County of Minnehaha, South Dakota and people resident within the said area hereinbefore described lying between the present boundaries of said drainage districts One and Two and the mouth of the outlet to said ditches and within the valley of the Big Sioux River, partly within the corporate limits of the City of Sioux Falls, and that in the reconstruction of the said ditches One and Two, it will be necessary that the same be cleaned, deepened, widened and that certain levees, dikes, flood gates and barriers thereto be constructed to such extent as may be necessary to carry out the surplus or flood waters and to properly drain and protect the lands within said drainage districts and within the area hereinbefore described and within the city of Sioux Falls and to properly conserve and promote the public health and welfare within the said area as aforesaid.

5. Your petitioners further represent that there should be constructed and installed in the said Drainage Ditches Numbers One and Two and at the head of the said Spillway or outlet of said Drainage Ditches, controlling gates for the purpose of regulating and controlling the amount of water flowing through the said ditches and over the said Spillway, the number and location of said gates and the manner in which they should be installed should be determined by the County Commissioners upon the advice of their engineers.

6. Your petitioners further represent that the present spillway or outlet to said Drainage Ditches Numbers One and Two where the same empties into the Big Sioux River in Section Nine (9) Township One Hundred and one (101) of Range

forty-nine (49) is wholly insufficient and has been practically destroyed by the action of the water therein, so that the same has become inefficient as a means of disposing of the waters flowing in said drainage Ditches Numbers One and Two and to such an extent that it has become dangerous to abutting property and to persons living within the vicinity thereof and that it is necessary to entirely abandon said present spillway or outlet and to construct an entirely new outlet or spillway in place thereof in accordance with a new and different plan therefor, the new spillway to be located at or near the present location of the present spillway.

7. Your petitioners further represent that the said drainage ditch or drainage system should consist of the following ditches: First a ditch having its initial point at the beginning of Section Two (2) of Drainage Ditch Number Two (2) of Minnehaha County as now established at the creek near the Northeast corner of Section thirty-one (31) Township One hundred four (104) of Range Forty-nine (49) and should then run Southwesterly to near the center of said Section thirty-one (31) and then south near the center line through said Section Thirty-one (31) and through Sections Six (6) and Seven (7) of Township one hundred three (103) of Range forty-nine (49) into Section eighteen (18) and then in a Southeasterly direction having its terminal point upon the Big Sioux River Sixteen hundred forty feet (1640) east of the said center of Section Eighteen (18), Township One hundred three (103) of Range forty-nine (49) following the present location of the said Section Two (2) of Drainage Ditch Number Two of Minnehaha County as now located.

Also a ditch having its initial point at the present beginning of Section One of Drainage Ditch Number Two of Minnehaha County, at the high water channel of the Big Sioux

63 River in the Southeast quarter of Section Twenty (20) Township One hundred three (103) of Range forty-nine (49) thence running in a general southerly direction through the Southeast quarter of Section Twenty (20) Township one hundred three (103) of Range forty-nine (49) and the Northeast quarter of Section twenty-nine (29), The Southwest quarter of Section twenty-eight (28) the west half of Section thirty-three (33) all in Township one hundred three (103) of Range forty-nine (49) and the west half of Section four (4)

the northwest quarter of section nine (9) the Southeast quarter of Section eight (8) the east half of Section seventeen (17), the east half of section twenty (20) and the east half of Section twenty-nine (29) all in Township one hundred and two (102) of Range Forty-nine (49) with its terminal point at the southern end of said Section One of Drainage Ditch Number Two in the Southeast quarter of Section twenty-nine (29), Township One hundred two (102) of Range forty-nine (49) following the line of the said Section One of Drainage Ditch Number Two as now established in Minnehaha County.

Also a ditch having its initial point at the present beginning of Drainage Ditch Number One of Minnehaha County at or near the Northeast quarter of the Southeast quarter of the Southeast quarter of Section twenty-nine (29) Township one hundred and two (102) of Range forty-nine (49) thence running south across the East half of the East half of Section Thirty-two (32) in Township one hundred two (102) of range forty-nine (49) and the East half of the Northeast quarter of Section Five (5) Township one hundred one (101) of Range forty-nine (49) and the Northeast quarter of the Southeast quarter of Section five (5) Township one hundred one (101) of Range forty-nine (49) thence across the West half of the Southwest quarter of Section four (4) in Township one hundred one (101) Range forty-nine (49), thence across

64 the northwest quarter of Section Nine (9) Township One hundred one (101) of Range forty-nine (49) and the Southwest quarter of the Northeast quarter of Section nine (9) township one hundred one (101) of Range forty-nine (49) where it empties into the Big Sioux River having its initial point and terminal point the same as and following the line of Drainage Ditch Number One as now established in Minnehaha County. With also, a branch drain or second part beginning at the point near the center of the Northeast quarter of the Northeast quarter of Section thirty-two (32) in Township one hundred two (102) of Range forty-nine (49) running thence in a southeasterly direction across the Southeast quarter of the Northeast quarter of Section thirty-two (32) in Township one hundred two (102) of Range forty-nine (49) to where it connects with the main ditch of Drainage Ditch Number One as now established in Minnehaha County.

8. Your petitioners further represent that in order to make the foregoing drainage system complete and adequate for the purposes for which it is designed, that it will be necessary to straighten, clear out and deepen the channel of the Big Sioux

River at a number of places within the said Drainage District and especially to straighten the channel, of the said River upon Section thirty-two (32) Township one hundred three (103) of Range forty-nine (49) by a ditch cutting off the bend in said river on said Section. Also to straighten the said River upon section Eight (8) Seventeen (17), Twenty (20) and Twenty-nine (29) in Township one hundred two (102) of Range forty-nine (49) by cutting off bends of the said Sioux River situated upon those Sections, the exact location of the said ditches for straightening, clearing out and deepening the channel of the said Sioux River to be determined by the County Commissioners upon advice of their engineers.

9. Your petitioners further represent and show that the lands and territory likely to be affected by the construction of such new spillway or outlet and by the reconstruction and improvement of said drainage ditches One and Two and which will be drained, benefitted and protected thereby and within which territory the public health and welfare will be promoted includes all of the lands lying in the valley of the Big Sioux River and included within the present boundaries of said Drainage Districts Numbers One and Two as well as all of the lands in said valley of the Big Sioux River between the mouth of said spillway or outlet to said ditches and the City of Dell Rapids, South Dakota, that are subject to overflow by the waters of the Big Sioux River and that will be subject to overflow and damage by the waters of said River if the said outlet to said Drainage Ditches Numbers One and Two be abandoned and said outlet thereto closed and that the said District should be so extended and enlarged as to include all lands and property benefitted thereby as far down the valley of the Big Sioux River as the mouth of said outlet or spillway and including therein the corporation of the City of Sioux Falls as well as the corporation of the County of Minnehaha, South Dakota, which said corporations your petitioners further represent are and will be largely benefitted by the reconstruction and improvement of said ditches and construction of said new outlet or spillway thereto to their highways, bridges and other corporate properties owned by them respectively.

Dated this 15th day of July, A. D. 1916.

Attest:

WALTER G. LEYSE,
City Auditor.

(Seal of the City
of Sioux Falls)

CITY OF SIOUX FALLS

By Geo. W. Burnside,
Mayor.

F. L. BLACKMAN,

W. BRALEY,

DEN DONAHOE

DAN A. DONAHOE,

W. M. DONAHOE

CATHERINE PECK

PORTER P. PECK

MARY C. BRACE

JOHN P. BLEEG

FRANCES G. CARPENTER

M. RUSSELL, By Louis Caille,
Agt.

McKINNEY & ALLEN

E. D. CLARK

C. C. BRATRUD

L. P. CALDWELL

66

Filed in the office of the Auditor of Minnehaha County,
S. D. this 3 day of Aug. 1916.

HARRY H. HOWE,
County Auditor.

67 Order for Filing Petition for Drainage

State of South Dakota,
County of Minnehaha—ss.

In re Drainage Ditch Numbers 1 and 2 Minnehaha County,
South Dakota.

Whereas F. L. Blackman and others of the County of Minnehaha, State of South Dakota, have this day presented to this Board a petition for the construction of a drainage ditch conducive to public health, convenience and welfare and for the purpose of draining agricultural lands in the Big Sioux

River Valley which lands have heretofore been drained and protected from overflow by ditches Number 1 and 2 of Minnehaha County as heretofore established and constructed, in which petition it is represented that it is necessary to re-construct, improve and extend said drainage ditches Number 1 and 2 and to construct a new spillway or outlet where said drainage ditch number one empties into the Big Sioux River in Section Nine (9), Township One Hundred and One (101), Range Forty-nine (49) by reason of the fact that the spillway or outlet of said drainage ditch number 1 is inadequate for its purpose and has been destroyed by action of the water; also that the drainage ditches number 1 and 2 are not adequate for the purpose of which they are constructed and that they should be cleaned, deepened and widened and levees, dikes, and barriers remodeled, re-constructed and improved in such places and to such extent as may be necessary to carry off the surplus or flood water and properly drain the land to be drained thereby and protect other land subject to overflow; also that there should be constructed and installed in said drainage ditches 1 and 2 necessary flood gates for the purpose of regulating the amount of water flowing
68 through; also that it is necessary in order to make such drainage system complete and adequate for the purpose for which it is designated to straighten, clear out and deepen the channel of the Big Sioux River at different places within the drainage district of said drainage ditches number 1 and 2, and said petition having been by this board examined and found sufficient in form and being accompanied by bond with sureties approved by the County Auditor.

Now Therefore it is hereby ordered by the Board of County Commissioners of Minnehaha County, South Dakota, that the said petition be forthwith filed with the County Auditor of this County and that a copy thereof be transmitted by the said County Auditor to the State Engineer:

A. G. RISTY,
Chairman of County Board.

Filed in the office of the Auditor of Minnehaha County,
S. D., this 3 day of Aug. 1916.

HARRY H. HOWE
County Auditor.

Resolution for Survey.

Whereas on the 3rd day of August, A. D. 1916, the City of Sioux Falls, F. L. Blackman and others of Sioux Falls, Minnehaha County, South Dakota, presented to this board a petition for the drainage of lands in the Big Sioux River Valley for the establishment of a drain chiefly to carry off the overflow of water of the Big Sioux River, such drain to begin at the beginning of Section two (2) of drainage ditch number 2 of Minnehaha County, as now established at the creek near the northeast corner of Section 31, Township 104, Range 49, and should end at a point on the said river near the center of Section 9, in Township 101, Range 49, where drainage ditch number 1 as now established in Minnehaha County, empties into the Big Sioux River, which petition was accompanied by a proper bond with sureties approved by the County Auditor of said County; and

Whereas said petition was by this board examined and found sufficient in form and was ordered filed with the County Auditor of said County, and was so filed on the 3rd day of August A. D. 1916; and

Whereas this board together with the State Engineer did on the 14th day of August, A. D. 1916, inspect the proposed route of such drainage; and

Whereas this board deems it necessary that a survey of the proposed drainage be made by a competent surveyor.

Now Therefore it is Ordered that a survey be made of the lands in the Big Sioux River Valley between the City of Dell Rapids and the terminus of said proposed drainage for the purpose of determining the exact line of said drainage and

the most practicable method of draining the entire section of the country of which the lands proposed to be drained are a part. Such surveyor shall include in his report to this board a description of the exact line of said drainage ditch or ditches as suggested in said petition, the size and width thereof [of], such survey to be made under the supervision of the State Engineer and report filed with the County Auditor with all convenient speed.

And the chairman of this board is hereby authorized to employ such surveyors and his assistants and purchase such material as may be necessary for such survey.

Approved this 14th day of Aug. 1916.

A. G. RISTY.

71 Resolution Fixing the Exact Line and Width of Ditch
and Fixing the Time and Place for Hearing
Petition.

(Commissioners Proceedings, September 13, 1916)

Whereas, on September 13, 1916, Mr. L. E. Stevens, Civil Engineer employed by this Board for the making of a survey for a proposed drainage ditch, in the valley of the Big Sioux River, in Minnehaha County, South Dakota, in the territory previously partially drained by Drainage Ditches Numbered One and Two, as heretofore established, pursuant to the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, did file his report of such survey, together with maps and profiles; and

Whereas, this Board has personally inspected the route of said proposed drainage, as described in said petition and as described in the engineer's said report;

Therefore, be it resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the route and width of said proposed drainage, be and the same is hereby fixed as described in said Engineer's report, and that the requisite right of way for said drainage ditch and dump space be as described in said engineer's report; and

Be it further resolved that Monday, the 2 day of October, 1916, at 2 o'clock, P. M. at the Office of the County Auditor of said County be and it is hereby fixed as the time and place for hearing of said petition and that notice thereof be given in accordance with the provisions of Section Four (4) of Chapter 134, of Laws of 1907, as amended by Chapter 102 of the Laws of 1909 of the State of South Dakota, the same to be signed by the Chairman of this Board and attested by the County Auditor, by publication once in each week
72 for two consecutive weeks in the Sioux Falls Daily Press, and by posting copies of said notice in at least three of the most public places near the route of said proposed drainage ditch, such posting to be made at least ten days prior to the time of said hearing.

Approved:

A. G. RISTY,
Chm. Co. Bd.

73 Resolution Establishing Drainage Ditch No. 1 and 2

The matter of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others, for the establishment of a drainage ditch, filed in the office of the County Auditor of Minnehaha County, South Dakota, on August, 3, 1916, coming on to be heard by the Board of County Commissioners of said county at a regularly adjourned meeting, on Monday, the 2 day of October, A. D. 1916, pursuant to notice heretofore given, the said Board having heard and considered said petition and all matters in support of the same, and in opposition thereto, and being fully advised by the state engineer with reference thereto, now therefore

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the said principal drainage ditch as hereinafter described and set forth, is conducive to the public health, convenience and welfare and it is necessary and practicable for the drainage of agricultural land and it is so found;

Be It Further Resolved that the said drainage ditch as hereinafter described be, and it is hereby named and designated as "Drainage Ditch No. 1 and 2";

Be It Further Resolved that the said Drainage Ditch No. 1 and 2 be and the same is hereby established in accordance with the resolution adopted by this Board on September 13, 1916, in so far as the same is set out and described in Sections One, Two, and Three of the engineer's report of preliminary survey, filed herein on September 13, 1916, and particularly described as follows:

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Section One.

Commencing at a point Fifty-eight (58) feet west and Ten Hundred and Thirty-five (1035) feet north of the Southeast corner of Section Twenty-nine (29), Township One Hundred and Two (102), Range Forty-nine (49) west of the 5 P. M. running thence South parallel to the adjacent highway Two Thousand and Eighty-five (2085) feet to Station One Hundred and Fourteen (114); also commencing at a point Six Hundred and Seventy-four (674) feet north and about Thirty-five (35) degrees west of said Station number One Hundred and Fourteen (114) thence southeasterly Six Hundred and Seventy-four (674) feet to said Station number One Hundred and Fourteen (114), thence south and parallel to said highway Seventy-seven Hundred (7700) feet to station number Thirty-seven (37) thence south forty-five (45) degrees

east Three Thousand Seven Hundred (3700) feet to station number zero (0) the same being on high water line, thence South Fifty-nine (59) degrees and Thirty-six (36) minutes east, Four Hundred and Fifty (450) feet, thence south Thirty-one (31) degrees east to the Big Sioux River, the said line being the center line of said drainage ditch, and is intended to cover the exact location of drainage ditch number 1 as now established and constructed.

Section Two.

Commencing at a point Ten Hundred and Thirty-five (1035) feet north and Fifty-eight (58) feet west of the Southeast corner of Section Twenty-nine (29) in Township One Hundred and Two (102) of Range Forty-nine (49), the same being the commencement point of Section 1, hereinbefore described, running thence north Five Hundred and Forty-seven (547) feet; thence north Twenty-three (23) degrees west Thirty-three Hundred and Eighteen (3318) feet to a point Fifty-eight (58) feet west of the quarter quarter line in the northeast quarter of Section Twenty-nine (29) in said Township; thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through Sections Twenty-nine (29), Twenty (20), Seventeen (17) and a part of Section Eight (8), Twelve Thousand Nine Hundred and Thirty-five (12,935) feet; thence north Fifty (50) degrees east Twenty-seven Hundred and Thirty-two (2732) feet to a point thirty-three (33) feet west of the west line of the right of way of the Chicago, Milwaukee & St. Paul Railway Company, in the Northwest quarter of Section Nine (9) in said Township; thence Northerly parallel with and Thirty-three (33) feet west, of said right of way line Nineteen Thousand Three Hundred and Sixty-eight (19,368) feet to a connection with a high water channel of the Big Sioux River in the Southeast Quarter of Section Twenty (20) in Township One Hundred and Three (103) North of Range Forty-nine (49).

Section Three. \

Commencing at a point Sixteen Hundred and Forty (1640) feet east of the center of Section Eighteen (18) in Township One Hundred and Three (103), Range Forty-nine (49); running thence north Thirty-three (33) degrees west Thirty-one Hundred and Fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8) in said Township; thence north parallel with and sixty (60) feet west of the quarter line in Sections Seven (7) and Six (6) in said Township and in Section Thirty-one (31)

in Township One Hundred and Four (104) North of Range Forty-nine (49) to the center line running east and west through said Section Thirty-one (31); thence north-
76 easterly to the creek near the Northeast corner of said Section Thirty-one (31), the said line being the center line of said proposed drainage.

That in addition thereto the Big Sioux River is to be straightened in Sections Seventeen (17), Eighteen (18) and Twenty (20) in Township One Hundred and Three (103), North of Range Forty-nine (49) in order to afford better means of communication between the lower end of Section Three (3) of said ditch and the upper end of Section Two (2) thereof; the same being intended to cover the exact location of drainage ditch Number Two (2) as now established and constructed.

Be It Further Resolved that the consideration and determination of the question of the straightening of the Big Sioux River at the several points recommended in said engineer's report, be deferred, without passing upon the merits thereof, to some later date, when said straightening of the Big Sioux River may be given more complete consideration, covering the points recommended and other points requested and suggested at the hearing.

Be It Further Resolved that in the construction of the said Drainage Ditch, the rights of flowage of the owner of the mill at or near Baltic, South Dakota, will not in any way be diminished or interfered with and the engineer is hereby directed to so establish the level of the bottom of said drainage ditch where the same joins with the creek near the Northeast Corner of Section Thirty-one (31) in Dell Rapids Township, that it will not diminish or interfere with said rights of flowage and that the headgate or other protection now established, be maintained to prevent the waters of the Big Sioux River from flowing into said ditch at a point lower than the
maximum height of such rights of flowage;

77 Be It Further Resolved that headgates or controlling gates be established in said drainage ditch, on Section Twenty (20) of Sverdrup Township and on Section Twenty-nine (29) or Thirty-two (32) in Mapleton Township at such place and of such size and material as the state engineer may direct;

Be It Further Resolved that a good substantial adequate spillway be constructed, under the supervision of the state engineer, in said ditch on Section Nine (9) of Sioux Falls Town-

ship and that an efficient, substantial controlling gate be constructed at the upper end of said spillway in such manner that the same can be closed and all water be prevented from entering said spillway;

Be It Further Resolved that this Board proceed to assess the damages sustained by each tract of land or other property through which the same shall pass and damages as compensation for the land taken for the route of such drainage and that the same may be made a special order for Friday, October 6, A. D. 1916, at ten o'clock A. M.

A. G. RISTY,
Chairman of Board of County Commissioners of Minnehaha County, South Dakota.

Filed in the office of the Auditor of Minnehaha County, S. D., this 3 day of October 1916.

HARRY H. HOWE
County Auditor.

Endorsed: Filed in the District Court on Sept. 1, 1921, at 9:30 A. M.

78 And afterwards, to-wit, on the 28th day of November, A. D. 1921, there was filed in the office of the clerk of said court, stipulation as to certain Drainage Ditch Notice and that same be considered as a part of the answers and returns of the defendants and intervening defendants; that attached to said Stipulation is a "Drainage Ditch Notice"; which said Drainage Ditch Notice is in words and figures the following, to-wit:

79 Drainage Ditch Notice.

Notice is hereby given that Monday, October 2, 1916, at 2 o'clock P. M., at the office of the County Auditor of Minnehaha County, South Dakota, has been fixed by the Board of County Commissioners of Minnehaha County, as the time and place for the hearing of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others filed August 3rd, 1916, for the establishment and construction of a drainage ditch, pursuant to the provisions of chapter 134 of the laws of 1907 of the State of South Dakota, as amended by chapter 102 of the laws of 1909, the exact line and width

of said drainage ditch was determined by action of said board on September 13, 1916, to be as follows:

Section One.

Commencing at a point fifty-eight (58) feet west and ten hundred and thirty-five (1035) feet north of the southeast corner of section twenty-nine (29) township one hundred and two (102) range forty-nine (49) west of the 5th P. M. runnig thence south parallel to the adjacent highway two thousand eighty-five (2085) feet to station one hundred fourteen (114); also commencing at a point six hundred and seventy-four (674) feet north and about thirty-five (35) degrees west of said station number one hundred fourteen (114), thence southeasterly six hundred and seventy-four (674) feet to said station number one hundred and fourteen (114), thence south and parallel to said highway seventy-seven hundred (7700) feet to station number thirty-seven (37), thence south 45 degrees east thirty-seven hundred feet (3700) to station number zero (0), the same being on high water line, thence south fifty-nine (59) degrees thirty-six (36) minutes east four hundred and fifty (450) feet, thence south thirty-one (31) degrees, east to the Big Sioux River, the said line being the
80 center line of said drainage ditch and is intended to cover the exact location of drainage ditch number 1 as now established and constructed.

Section Two.

Commencing at a point ten hundred and thirty-five feet (1035) north and fifty-eight (58) feet west of the southeast corner of section twenty-nine (29), in township one hundred and two (102) of range forty-nine (49), the same being the commencement point of section one (1), hereinbefore described running thence north five hundred and forty-seven (547) feet; thence north twenty-three (23) degrees west three thousand three hundred and eighteen (3318) feet to a point fifty-eight (58) feet west of the quarter quarter line in the northeast quarter of section twenty-nine (29) in said township, thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through sections twenty-nine (29), twenty (20), seventeen (17) and a part of section eight (8), twelve thousand nine hundred and thirty-five (12,935) feet; thence north fifty (50) degrees east twenty-seven hundred and thirty two (2732) feet to a point thirty-three (33) feet west of the west line of the right of way to the Chicago, Milwaukee & St. Paul Railway Company in the northwest quarter of section (9), in said township; thence northerly

parallel with and thirty-three (33) feet west of said right of way line nineteen thousand three hundred and sixty-eight (19,368) feet to a connection with a high water channel of the Big Sioux River in the southeast quarter of section twenty (20) in township one hundred and three (103) north of range forty-nine (49).

Section Three.

Commencing at a point sixteen hundred and forty (1640) feet east of the center of section eighteen (18) in township one hundred and three (103), range forty-nine (49) running thence north thirty-three (33) degrees west thirty-one hundred and fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between sections seven (7) and eight (8) in said township; thence north parallel with and sixty (60) feet west of the quarter line in sections seven (7) and six (6) in said township and in section thirty-one (31) in township one hundred and four (104) north of range forty-nine (49) to the center line running east and west through said section thirty-one (31); thence northeasterly to the creek near the northeast corner of said section thirty-one (31). The said line being the center line of said proposed drainage ditch.

That in addition thereto the Big Sioux river is to be straightened in sections seventeen (17), eighteen (18) and twenty (20) in township one hundred and three (103) north of range forty-nine (49) in order to afford better means of communication between the lower end of section three (3) of said ditch and the upper end of section two (2) thereof; the same being intended to cover the exact location of drainage ditch number 2 as now established and constructed.

I further recommend that the Big Sioux river be straightened on section thirty-two (32), township one hundred and three (103) north of range forty-nine (49) west by the construction of a cut off beginning at the intersection of the center line of the highway bridge across the Big Sioux river, on the town line between sections thirty-two (32), township one hundred and three (103), range forty-nine (49) and section five (5), township one hundred and two (102), range forty-nine (49) and the center line of said river; thence northerly at right angles to said bridge two hundred (200) feet; thence 82 northwesterly at an angle of twenty (20) degrees to the west, nine hundred and fifty (950) feet; thence northerly at an angle of nineteen (19) degrees to the east twenty-eight hundred and fifty (2850) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section eight (8), township one hundred and two (102) range forty-nine (49) by the construction of a cut off beginning at a point in the center line of the Big Sioux river, twenty-one hundred and seventy (2170) feet easterly and seven hundred and eighty-five (785) feet southerly from the northwest corner of section eight (8) township one hundred and two (102), range forty-nine (49); thence easterly parallel with the north line of said section eight (8) three hundred (300) feet; thence northeasterly at an angle of twenty degrees (20) to the north, four hundred (400) feet, to the center of said river.

I further recommend that the Big Sioux river be straightened on section eight (8) township one hundred and two (102) range forty-nine by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the east and west quarter line of section eight (8), township one hundred and two (102), range forty-nine (49); thence northerly at an angle of forty-one (41) degrees and thirty (30) minutes to the north eight hundred (800) feet; thence northwesterly at an angle of seventy-five (75) degrees to the west five hundred and fifty (550) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section seventeen (17), township one hundred and two (102), range forty-nine (49) by the construction of a cut off beginning at a point in the center line of the Big Sioux river seven hundred and twenty (720) feet southerly and six hundred and twenty (620) feet easterly from the west quarter post of section seventeen (17) township one hundred and two (102), range forty-nine (49); thence northerly parallel with the westerly line of said section seventeen (17) six hundred (600) feet; thence northwesterly at an angle of twenty-nine (29) degrees to the west fourteen hundred and ten (1410) feet; thence northerly at an angle of twenty-nine (29) degrees to the east fifteen hundred and sixty (1560) feet; thence northeasterly at an angle of fifty-five degrees (55) to the east eight hundred and seventy (870) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section twenty (20), township one hundred and two (102), range forty-nine (49), by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the north line of section twenty (20), town-

ship one hundred and two (102), range forty-nine (49), thence southeasterly at an angle of one hundred and thirteen (113) degrees to the east six hundred and ten (610) feet; thence southwesterly at an angle of thirty-one (31) degrees to the west ten hundred and eighty (1080) feet; thence southwesterly at an angle of twenty-one (21) degrees to the west thirteen hundred and eighty (1380) feet to the center of said river.

Also in said section twenty (20) beginning at the intersection of the center line of Big Sioux river and the south line of section twenty (20), township one hundred and two (102) range forty-nine (49); thence northwesterly at an angle of sixty-two and one-half ($62\frac{1}{2}$) degrees to the north twenty-one hundred and ten (2110) feet; thence northerly at an angle of twenty-eight (28) degrees to the east five hundred (500) feet to the center of said river.

I further recommend that the Big Sioux River be straightened on section twenty-nine (29) township one hundred and two (102) range forty-nine (49) by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the north line of section twenty-nine (29) township one hundred and two (102), range forty-nine (49); thence southerly at an angle of 81 degrees to the south twenty-nine hundred and ninety (2990) feet; thence southeasterly at an angle of thirty-five (35) degrees to the east ten hundred and ninety (1090) feet; thence southerly at an angle of thirty-seven and one-half ($37\frac{1}{2}$) degrees to the west eleven hundred (1100) feet, to the center of said river.

All of the above cut-offs to have a bottom width of sixty (60) feet and side slopes of one and one-half ($1\frac{1}{2}$) to one (1). A right of way one hundred (100) feet in width, one-half each side of the above described center lines will be required.

The tract of country likely to be affected by the establishment and construction of the said proposed drainage is in general terms described as follows: Sections four (4), five (5), six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty-two (22), twenty-seven (27), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), in township one hundred and one (101) of range forty-nine (49); sections thirteen (13), twenty-four (24) and twenty-five (25) in township one hundred and one (101), range fifty (50); sections three (3), four (4), five (5), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21),

twenty-eight (28), twenty-nine (29), thirty-one (31), thirty-two (32) and thirty-three (33) in township one hundred and two (102), range forty-nine (49); sections five (5), six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), twenty (20), twenty-one (21), twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty-two (32), thirty-three (33) and thirty-four (34) in township one hundred and three (103), range forty-nine (49); sections twenty-nine (29), thirty-one (31) and thirty-two (32) in township one hundred and four (104), range forty-nine (49), including also the mill property at or near the town of Baltic and the tracts of country covered by the right of flowage belonging to said mill property. Also the following additions to the City of Sioux Falls, Minnehaha County, South Dakota; North Boulevard addition, Carpenter's addition, Central Park addition, Meredith's First Addition, Meredith's Second addition, Harrison's addition, Lincoln Park addition, Englewood addition, West Lawn addition, Sioux Falls Improvements Company's addition, North Park Addition, North Park Second addition, Brooks' addition, Bunker's addition, Lake View addition, Brookings addition, Berwick addition, Summit addition, McClellan's Second addition, West Park addition, Pettigrew & Tate's Eighth addition, Glendale addition, Scott's Second addition, Morningside addition, Van Eps' addition, Millsbaugh's addition, Daniels' addition, Morse's addition, Gale's addition, Gale's Sioux Falls, Phillips' addition, Syndicate addition, Central addition and W. R. Green addition.

The separate tracts of land through which said proposed ditch will pass and parts of which will be required therefore and for dump space, and the names of the owners of said tracts as appears from the records in the office of the register of deeds of said county on August 3rd, 1916, that being the date of filing said petition, are as follows:

Owner	Description	Township	Range
Lars Simonson	NW¼ of NW¼	Sec. 32 104	49
Lars Simonson	NE¼ of NE¼	" 31 104	49
Lars Simonson	SE¼ NE¼	" 31 104	49
Gustava Nelson	SW¼ of NE¼	" 31 104	49
P. G. Thompson	E½ of SW¼	" 31 104	49
Julia L. Moe	NW¼ of SE¼	" 31 104	49
Even O. Fossum	NE¼ of NW¼	" 6 103	49
Gunerius Thompson	All that part of SE¼ of NW¼ Sec. 6	103	49
	lying south of a certain slough running West of Northwest to end of drain ditch		

E. P. Sorkilmo	All that Part of SE¼ of NW¼ Sec. 6 located & lying on the north side of a certain intermittent water-course or slough running through the center of said section in a northwesterly course to ditch on the west line of said "40" except the N½ of N½ of said SE¼,	103	49
Lina Hanson,	N½ N½ SE¼ NW¼ Sec. 6,	103	49
Gunerius Thompson	E½ of SW¼ Sec. 6	103	49
Ole J. Ustrud	E½ of NW¼ Sec. 7	103	49
Magnhild Floren, Olaf	E½ of SW¼ Sec. 7	103	49
Berthum Floren,			
Mabel Floren & Ovida			
Mathilda Floren			
Andrew Swenson Aas	E½ of NW¼ Sec. 18	103	49
John O. Aasen	S½ of NE¼ Section 18	103	49
B. G. Flamoe	NE¼ of NW¼ Sec. 20	103	49
Bernt G. Flame	SE¼ of NW¼ Sec. 20	103	49
Peter Paulson,	E½ of SE¼ Sec. 20	103	49
Olympious S. Thompson	Tract 3 of County Auditor's Subdivision of the NE¼ of Sec. 29	103	49
Olympious S. Thompson	SE¼ of NW¼ and W½ of SW¼ of Sec. 28	103	49

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Owner	Description	Township	Range
Bertha Peterson, Alice,			
Christina Thompson,			
John Oscar Thompson,			
William Henry Thompson,			
Fred Raymond			
Thompson, Reuben			
Victor Thompson,			
Mabel Josephine			
Thompson, Carl Melvin			
Thompson	SW¼ of NW¼	Sec. 33 103	49
Andrew J. Aason	NW¼ of NW¼	" 33 103	49
Joseph C. Thompson	NW¼ of SW¼	" 33 103	49
Thomas Hendrickson	SW¼ of SW¼	" 33 103	49
Ole Thompson Aspass	W½ of NW¼	" 4 102	49
Martin H. Oyen and			
Cleopatra H. Oyen	W½ of SW¼	" 4 102	49
Martin Oien	W½ of NW¼	" 9 102	49
Martin H. Oien	SE¼ of NE¼	" 8 102	49
Ole Gunderson	W½ of SE¼	" 8 102	49
Leonard Renner	E½ of SE¼	" 8 102	49
Ingeberg Peterson			
Peter R. Peterson			
Iver R. Peterson			
Gertie R. Peterson,	W½ of NE¼	" 17 102	49
Christian J. Orstad	W½ of SE¼	" 17 102	49
Albert N. Allis	W½ of NE¼	" 20 102	49
Robert J. Huston	W½ of SE¼	" 20 102	49
Charles E. Kaufmann,	NE¼ & NE¼ of SE¼ of Section 29	102	49

State of South Dakota	SE $\frac{1}{4}$ of SE $\frac{1}{4}$	Sec. 29	102	49
State of South Dakota	E $\frac{1}{2}$ of NE $\frac{1}{4}$ & NE $\frac{1}{4}$ of SE $\frac{1}{4}$	" 32	102	49
Hans Ruvald	SE $\frac{1}{4}$ of SE $\frac{1}{4}$	" 32	102	49
Hans Ruvald	E $\frac{1}{2}$ of NE $\frac{1}{4}$ & NE $\frac{1}{4}$ of SE $\frac{1}{4}$	" 5	101	49
City of Sioux Falls	Starting at Southwest corner of Section 4, running thence east along Sec. line to the cen- ter line of County Ditch #1 as shown on Map #3 of the recorded plat of said ditch, thence in a northwesterly di- rection along the center line of said ditch to the west line of Sec. 4 thence south along said section line to the place of beginning		101	49
State of South Dakota	SW $\frac{1}{4}$ of Sec. 4, except above described tract		101	49

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Name	Description	Township	Range
Southern Minnesota Railway Extension Company (Now Chi- cago Milwaukee & St. Paul Railway Company)	Right of way across the SW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 4	101	49
Watertown & Sioux Falls Railway Company	Right of Way across the SW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 4	101	49
Watertown & Sioux Falls Railway Company	Right of Way across the East $\frac{1}{2}$ of SE $\frac{1}{4}$ Sec. 5,	101	49
Chicago, Milwaukee & St. Paul Railway Com- pany	Right of Way of Madison Branch, on Sections 8 and 9,	102	49
Mapleton Township	Interest in Highway adjacent to the line of the proposed ditch in Sections 4, 8, 9, 17, 20 and 29	102	49
Sverdrup Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 6, 7, 18, 20, 28, 29 and 33.	103	49
Dell Rapids Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 29, 30, 31 and 32,	104	49
Sioux Falls Township	Interest in Highways adjacent to the line of the proposed ditch in Sections 4 and 5 and 9	101	49

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Berwick Addition to Sioux Falls

	Lot No.	Block No.
Elwin L. Potter	1, 2 and 3	5

Arthur D. Horton	5, 6, 7, 8, 9, 10 and 11	4
State of South Dakota	1, 2 and 3	13
Grant Lines	5, 6, 10 and 11 lying east of Drainage Ditch	14
State of South Dakota	7, 8, and 9	14
State of South Dakota	1, 2 and 3	19
Sophia Krull,	4	18
Sophia Krull, Emma Buchholz, Mary Toep- fer, Charles Krull, Wil- liam F. Krull and Otto R. Krull	5 and 6	18
Sophia Krull	7, 8, 10, 11	18
George W. Hanson (Fee) Security Sav- ings Bank (Tax title)	9	18
Moses M. Robinson	1	31
Security Savings Bank	2 & 8	31
James Kennedy	3	31
Security Savings Bank	All of Block	32
* * * * *		

The Kittery Realty Company—Tract 2 of NE $\frac{1}{4}$ Section 9, Twp. 101, Rge. 49.

The Kittery Realty Company—Tract 3 of NE $\frac{1}{4}$ Sec. 9 Twp. 101 Rge. 49.

State of South Dakota. Tract 3 of NW $\frac{1}{4}$ Sec. 9, Twp. 101 Rge. 49.

90 The separate tracts of land wherein the Big Sioux River is proposed to be constructed and which will likely be affected thereby and the names of the owners of said tracts as appear from the records of the office of the Register of deeds of said County on August 3rd, 1916, that being the date of the filing of said petition, are as follows:

Name of Owner.	Description	Township	Range
Andrew J. Aasen,	W $\frac{1}{2}$ NE $\frac{1}{4}$ Section 32	103	49
Andrew J. Aasen	NE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 32	103	49
Joseph O. Thompson,	S $\frac{1}{2}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$ Section 32,	103	49
Gus S. Thompson,	N $\frac{1}{2}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$ Section 32.	103	49
Jonas L. Finnegan,	N $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 32,	103	49

Margaret Finnegan,	SE¼ of SE¼ Sec. 32,	103	49
John Finnegan,	SW¼ of SE¼ Sec. 32	103	49
Ole Gunderson,	NW¼ Sec. 8	102	49
Iver Nelson,	NW¼ of SW¼ Sec. 8,	102	49
Jonas Olson,	SW¼ of SW¼ Sec. 8.	102	49
Ole Gunderson,	E½ of SW¼ Sec. 8,	102	49
Iver R. and Palma Peterson,	NW¼ of NW¼ of Sec. 17	102	49
Bernt Mekvold,	SW¼ of NW¼ Sec. 17	102	49
C. C. Fleischer,	NW¼ of SW¼ Sec. 17,	102	49
Iver R. and Palma Peterson,	East 26 acres of NE¼ of NE¼ Sec. 18	102	49
Bernt Mekvold,	SE¼ of NE¼ Sec. 18	102	49
W. O. Quincy,	W½ of NW¼ Sec. 20	102	49
Albert N. Allis,	E½ of NW¼ Sec. 20,	102	49
Robert J. Huston	N½ of SW¼ Sec. 20,	102	49
Charles Kaufmann,	S½ SW¼ Sec. 20,	102	49
Charles Kaufmann,	W½ of NE¼ Sec. 29	102	49
Charles Kaufmann,	NE¼ of NW¼ Sec. 29	102	49
Ole P. and Maria Schjodt	W½ of SE¼ Sec. 29	102	49
Berit Johnson,	NE¼ of SW¼ Sec. 29	102	49

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In addition to the above, notice is also given to Minnehaha County, Townships of Sioux Falls, Mapleton, Sverdrup, and Dell Rapids in said County and the City of Sioux Falls in said County on account of benefits to highways, bridges, parks and city waterworks plant in the said drainage area and notice is also given to the Chicago, Milwaukee & St. Paul Railway Company, also to the Watertown & Sioux Falls Railway Company on account of the benefits to their rights of way within said drainage area;

All persons affected by said proposed drainage are hereby summoned to appear at said hearing and show cause, if any they have why the said drainage should not be established and constructed;

And all persons deeming themselves damaged by said proposed drainage or claiming compensation for the lands proposed to be taken for said drainage are hereby summoned to present their claims therefor at said hearing.

Reference is hereby made to the files in said proceedings for further particulars.

Dated this 15th day of September A. D. 1916.

THE BOARD OF COUNTY
COMMISSIONERS,

By: A. G. Risty, Chairman.

Attest:

(Seal) Harry H. Howe, County Auditor
By E. H. Shenkle Deputy.

Filed in the office of the Auditor of Minnehaha County,
S. D., this 15 day of Sept., 1916.

HARRY H. HOWE, County Auditor,
By E. H. Shenkle, Deputy.

93 (Order directed to defendants to show cause why plaintiff should not be permitted to amend bill of complaint.)

Upon motion of plaintiff in the above entitled action and upon the affidavit of H. E. Judge, Solicitor for plaintiff, duly filed herein, it is Ordered that the defendants and intervening defendants in said action show cause, if any they have, before the court on the 31st day of January, 1922, at 10 o'clock A. M., why plaintiff in said action should not be permitted to amend its bill of complaint to conform to the proof in the manner set forth in said motion.

94 It is further Ordered that copies of this order to show cause, and of said motion and affidavit of H. E. Judge, be forthwith served upon the solicitors for said defendants and intervening defendants.

Done at Sioux Falls, in said district, this 28th day of January, 1922.

By the Court:

(Seal of Court)

JAS. D. ELLIOTT

Judge.

Attest:

Jerry Carleton,
Clerk.

Service of the foregoing order admitted January 28, 1922.

E. O. JONES

Attorney for Defendants.

PORTER & BARTLETT

Attorneys for Interveners.

Endorsed: Filed in the District Court on Jan. 28, 1922, at 2:30 P. M.

96 (Affidavit of H. E. Judge in support of order to show cause.)

State of South Dakota,
County of Minnehaha—ss.

H. E. JUDGE, being duly sworn, says that he is one of the solicitors for the plaintiff in the above entitled action; that upon the trial of said action evidence was offered and received tending to establish and in the opinion of deponent establishing the fact that the defendants County Commissioners in said action in their attempted application of the purported drainage ditch statutes of the State of South Dakota to the matters involved in said action, and particularly in the matter of the attempted assessment of plaintiff's property acted arbitrarily and upon a basis purely arbitrary and speculative, and that their acts in the matter were such as would result in depriving plaintiff of its property without due process of law and to deprive plaintiff of the equal protection of the laws, all in violation of the Federal Constitution; that the question arose at the trial of said action as to whether or not plaintiff's bill of Complaint contained sufficient allegations to raise such issue; that it was deponent's opinion at the time that said bill of complaint did contain sufficient allegations; that the bill is somewhat lengthy and voluminous, and at the time such question was raised deponent was unable to take the time to consider it carefully; that upon a careful consideration of said bill it appears that there is doubt as to whether or not it raises the issue above referred to, and that in order that there may be no further question with reference to said pleading

97 deponent is desirous of amending the same to conform to the proof received upon the trial, and that plaintiff will submit to such terms, if any, as may be imposed by the court by reason of such amendment.

H. E. JUDGE.

Subscribed and sworn to before me this 28th day of January, 1922.

(Notarial Seal) N. B. SAVAGE,
Notary Public, South Dakota.

Endorsed: Filed in the District Court on Jan. 28, 1922.

99 (Return of defendants to order to show cause why plaintiff should not be permitted to amend bill of complaint.)

Come now the defendants and intervening defendants, in the above entitled action and for return to the plaintiff's Order to Show Cause, issued hereon, on January 28, 1922, say that the plaintiffs said Motion should be denied and the prayer of the plaintiff to amend its bill be denied for the following reasons:

1. That said offer to amend comes too late, and after the entire case has been tried, argued and brief submitted.

2. That the same injects an entirely new cause of action into the bill of complaint which will require a new trial and additional evidence upon the hearing upon the same; the only evidence heretofore introduced going only to the application of the rule for the apportionment of benefits, and that the statute furnishes a determinable basis for the apportionment of benefits upon railroad and other property.

3. That the proposed amendment does not conform to the facts proven in the following particulars:

(a) That the proposed amendment assumes that the board of county commissioners were acting under jurisdiction obtained in the establishment of old Drainage Ditches No. 1 and No. 2, instead of the new drainage proceedings designated as Drainage Ditch No. 1 and 2.

100 (b) That the proposed amendment further assumes that "the equalization of the proportion of benefits" has been made, whereas, the proof shows that merely the tentative fixing of the apportionment of benefits has been made and that no equalization has been made on hearing upon equalization had.

(c) The proposed amendment assumes that the plaintiffs property "has not been and can never be benefited", etc, by old drainage ditches No. 1 and No. 2, while the evidence shows a substantial benefit under Drainage Ditch No. 1 and 2.

(d) The proposed amendment assumes "that the said assessment is so arbitrary, etc., as to deprive the plaintiff of its property without due process of law" while the evidence shows that no "assessment" or "equalization of benefits" has been made or attempted, and under the drainage law no such assessment can be made until after the proportion of benefits has been equalized and finally fixed.

(e) The proposed amendment assumes that the board of county commissioners will act arbitrarily in this matter, and not according to the proofs submitted.

4. That the amendment does not attack the drainage law as arbitrary or the unit provided by the law as arbitrary, but alleges that the acts of the board in fixing the proportion of benefits is arbitrary, speculative and unjust, whereas the proof shows the board, with its engineer, personally inspected the property affected and exercised its honest judgment as to the benefits received, and the undisputed evidence further shows that some benefits [was] received. And where there are disputable grounds of discretion or disputable degrees of benefit it cannot be said that such proof establishes arbitrary action.

5. Under the drainage law the board of county commissioners are created the initial tribunal with exclusive jurisdiction to determine the questions presented by the proposed amendment and an appeal to the state courts is provided from such determination by anyone deeming themselves aggrieved, which provides due process of law and gives the plaintiffs equal protection of the laws.

For all of which reason the defendants insist that the Motion of the plaintiff be dismissed.

E. O. JONES

Attorneys for Defendants.

PORTER & BARTLETT

Attorneys for Intervening Defendants.

Endorsed: Filed in the District Court on Jan. 31, 1922.

103 (Affidavit of E. O. Jones, and N. B. Bartlett in support of return to order to show cause.)

State of South Dakota,
County of Minnehaha—ss.

E. O. Jones and N. B. Bartlett, being first duly sworn on oath, depose and say: That they are the solicitors for the defendants and intervening defendants above named and that they as such, draw the answers for said defendants to plaintiff's bill of complaint herein, and have had charge of the preparation and trial of the issues in the above entitled matter; that the bill of complaint herein was filed in the above named court on July 25, 1921, and that the answers of the above named defendants and intervening defendants were filed in the above named court on September 1, 1921. That upon the hearing of plaintiff's order to show cause why an interlocutory injunction should not be granted, heard before three judges in this court on or about November 28, 1921, affiants, in presence of plaintiff's attorneys, read to said court a part of plaintiff's bill of complaint herein, wherein plaintiff attempted to set forth its jurisdictional grounds and its purported constitutional question raised by said pleadings and at that time affiants stated in open court, in the presence of plaintiff's attorneys, that the bill of complaint herein did not allege fraud or arbitrary action on the part of the defendant Board of County Commissioners; that notwithstanding said
104 statement in open court, said plaintiff offered no amendment to its bill of complaint, nor did it contradict the statement of affiants nor call the court's attention to any allegation in its complaint wherein the same contained allegations of fraud or arbitrary action on the part of said Board of County Commissioners, nor did they at said time, or at all, state to said court that they were of the opinion that said bill contained any such averments, or that they were relying thereon in this cause of action, nor is there any showing before this Court now that plaintiff ever intended at any time prior to this motion, to raise by its bill the question of arbitrary action by the Board.

That on December 15, 1921, said matter came on for final determination before the above named court, and upon the first day of said hearing, affiants objected to the evidence offered by plaintiffs purporting to show that the plaintiff was not benefited by Drainage Ditch No. 1 and 2, and, among other grounds, stated at said objection, objected to said testimony for the reason that neither fraud nor arbitrary action was alleged in the bills of complaint, which objections are hereto attached. hereby referred to and made a part hereof. That at said time, the Honorable James D. Elliott, presiding judge,

overruled said objection pro forma and stated in open court that after the trial of said cause, he would take said objections and decide them in the order in which they were presented, and at said time stated in substance to plaintiff's counsel that he assumed that they had alleged that the action of the Board in fixing the apportionment was arbitrary and asked plaintiff's counsel if that were true, but that plaintiff's counsel, to the best of your affiants knowledge and belief, did not reply to said question, although plaintiff's counsel at said time did examine its bill of complaint and attempted to find such allegations therein. That said trial proceeded upon the 105 15th, 16th and 17th of December, and all of which evidence on behalf of the plaintiff was received over the foregoing objections of the defendants as hereinbefore set forth, and during all of said time, plaintiff's counsel had due notice of, and was informed of the state of its pleadings. That thereafter, and on December 20, 1921, said matter was orally argued before the Honorable James D. Elliott, presiding judge of the above named court, at which time affiant again read to said court the allegations in plaintiff's bill of complaint, setting forth its jurisdictional grounds and the constitutional questions raised, and again stated in open court that said bill of complaint contained no allegation of fraud or arbitrary or confiscatory action on behalf of the defendant Board of County Commissioners. That said plaintiff again neglected, failed and refused to offer an amendment to its bill of complaint, although duly informed of the contents thereof. That at said time, affiants distinctly called to the court's attention the allegations of plaintiff's bill, wherein it is alleged: "That said statute Exhibit "A" is further void and unconstitutional in that the same provides no fixed and determinable method or rule for the apportionment of benefits upon the property and property holders situated within the drainage area and furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad companies" and stated to said court that said allegations did not constitute an averment of arbitrary action on the part of the Board of County Commissioners. That notwithstanding these statements in open court at the time of said argument on December 20, 1921, said plaintiff failed and neglected to offer an amendment and failed and neglected to state to the court at said time, or to contend orally at said time that said bill of complaint contained any allegations of arbitrary action on the part of said defendant Board of Commissioners. That said plaintiff's brief herein was filed 106 on or prior to December 30, 1921, and that more than

thirty days elapsed after the filing of said brief before said plaintiff complained that said bill of complaint was deficient and moved to amend the same. And affiants verily believe that the plaintiff never intended to allege that the actions of the Board of County Commissioners herein, were arbitrary, nor has he at any time stated in any manner, prior to the present time, that he ever intended to raise the issues presented by his proposed amendment by said bill of complaint herein.

Affiant further says that no evidence has been offered herein showing or tending to show that the equalization of benefits has ever been made by the Board of County Commissioners. That the evidence offered on the part of the plaintiff to show that the plaintiff was not benefited thereon was objected to by the defendants at the time the offer was made, which objections are hereto attached and made a part hereof, and said objections gave notice to the plaintiff that his bill did not contain any averment of arbitrary action on the part of said Board of County Commissioners, and said plaintiff neglected and failed to immediately offer an amendment to his said bill when the same was thereby objected to.

That the evidence offered by the plaintiff and by which the said plaintiff is bound does not support the proposed amendment and is substantially as follows: That the taking of the water out of the river into the ditch at a place known as Thompsons, about twelve miles north of Sioux Falls, and by-passing the same through the ditch, again returning it to the river at the spillway, is of benefit to all land and property affected adjacent to the river in that stretch of the river; that the ditch carries and by-passes from one-third to one-half of the flood water in the Sioux valley and therefore relieves the valley and the lands therein of flood water in
107 from one-third to one-half less time than it would otherwise take to relieve said land from said flood waters along that stretch of the river.

That the plaintiff herein is the owner of a right of way commonly known as acreage land within the stretch of the river so benefited which is adjacent to other acreage land in the benefited district, and is like affected and benefited and like apportioned as such other acreage land. That the Board of County Commissioners had a topographical survey made of the property affected by this drainage ditch included in which is the plaintiff's property. That thereafter, the Board of County Commissioners and its engineer made a personal careful inspection of plaintiff's property and found that the acreage land owned by plaintiff was benefited to the same extent

and in the same manner that adjoining acreage property was benefited, and apportioned its benefit accordingly, and found further and it was their judgment that the embankments, bridges and culverts on plaintiff's property were also benefited. That the same unit of benefit that was used and applied to acreage land in general was applied to this plaintiff's acreage land and also applied to the capitalized benefits to the embankment, bridges and culverts of this plaintiff in the same manner as it was applied to other like property within the drainage area. That Drainage Ditch No. 1 and Drainage Ditch No. 2 have been entirely completed and abandoned and are not a part of the present ditch project and that Drainage Ditch No. 1 and 2, now in controversy is an entire separate and distinct drainage project from Drainage Ditch No. 1 and Drainage Ditch No. 2.

There being no allegation of arbitrary action on the part of said Board of County Commissioners, the defendants herein did not prepare and try said case upon said issues and if such be now made a part of the bill of complaint herein, it will be necessary to introduce additional evidence to justify the proportionment made by the Board. That the defendants will be compelled to and are prepared to show by competent evidence that the right-of-way of the plaintiff company upon which the apportionment was fixed here-
108 in has been flooded in the past and prior to the completion of Drainage Ditch No. 1 and 2 and grade weakened to such an extent by reason of said waters along the same, that the action of said waters thereon increased the maintenance thereof, and that since the completion of said present drainage project, they have not suffered by reason of waters along their right-of-way, or upon their grades, and that the same has lessened the maintenance and upkeep of said grade and said railroad tracks. That since the establishment and construction of said drainage project plaintiff's bridges which it has over the river within said drainage area can be shortened and the approaches filled in, and that the plaintiff has already taken steps to shorten some of said bridges, and that the shortening of said bridges and the filling in of the approaches is a direct benefit to said plaintiff and is a resultant action of the taking away of from one-third to one-half of the flood waters by said drainage ditch project. That the defendants will be compelled to and will be prepared to establish by competent evidence that the Milwaukee Railroad bridge over the Sioux River in the City of Sioux Falls is only 205 feet long in the clear, and permits all the water now flowing in said river to pass thereunder; that the plain-

tiffs bridge within said city is not over 2000 feet above said Milwaukee bridge, is 615 feet in length and can safely be shortened to 268 feet and the approaches thereto filled thereby making a substantial saving to the plaintiff, all as a result of by-passing from one-third to one-half of the flood waters by this drainage project, away from said properties. That the only evidence that defendant offered in the trial of said case under the pleadings was that the plaintiff enjoyed some benefit but that the defendants did not attempt to show the amount of benefit, and, therefore, the amount of apportionment of benefit which the plaintiff enjoyed to any particular part of its property. That if the amendments herein are allowed, it will be necessary for the defendants to make
109 such a showing and to justify the apportionment of benefit as tentatively made by the Board of County Commissioners, and that in order to do this it will be necessary to open up said case and to have an entirely new and additional hearing. That the attempted amendment is an injection of an entirely new cause of action, and the same is not germane to the cause of action as stated in the bill, and changes the entire character of said cause of action and would be a gross abuse of this court's discretion.

That the return of the defendants hereto attached, is hereby referred to and made a part hereof.

E. O. JONES
N. B. BARTLETT

Subscribed and sworn to before me this 31st day of January, 1922.

(Notarial Seal)

R. A. BIELSKI,

Notary Public, South Dakota.

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Exhibit "A"

F. E. WARD, being called as a witness on behalf of the plaintiffs and being duly sworn, testified as follows:

Direct Examination

By Mr. Judge:

Mr. Bartlett: The defendants now move the Court that plaintiff's bills of complaint herein be dismissed and the restraining order set aside for the reasons that said bills of complaint fail to state any matter of equity entitling the plaintiff to the relief prayed for. Nor are the facts stated therein sufficient to entitle plaintiffs to any relief against these defendants.

For the further reason that this Court has no jurisdiction over these matters because the plaintiff's bills of complaint herein do not set forth any matter of equity in addition to the pretended constitutional question, said complaints not setting forth facts sufficient from which this Court can infer or assume that there will result a multiplicity of suits, irreparable injury or a cloud cast upon the title of their property or any special circumstances to bring the cases under some recognized head of equity jurisdiction, it affirmatively appearing that plaintiffs have a plain, adequate and complete remedy at law.

For the further reason that it affirmatively appears from the face of the bills of complaint and record that there is no jurisdictional amount in controversy at this time and these actions are premature and that no assessment or tax has in fact been equalized, assessed or levied, and that the state tribunal having jurisdiction thereof was enjoined by these proceedings before it had opportunity to perform its statutory duties, equalize or determine or fix the amounts of benefits
assessment or tax chargeable against the property of
111 the plaintiffs if any, and if the plaintiffs will establish that they received no benefits by reason of the ditch in controversy, as alleged in said bills, before the state tribunal appointed by law to equalize the apportionments of benefits, then no assessment or tax against their property will be made, and they can suffer no irreparable injury, multiplicity of suits, nor will any cloud be cast upon the title to their property.

For the further reason that the findings and determination of the State Tribunal upon questions of fact before them, are conclusive upon this Court in this action, this Court having no original jurisdiction by a bill in equity to reject or control the proceedings of that tribunal, the same being the Board of County Commissioners of Minnehaha County, South Dakota, in these ditch proceedings.

The Court: I am disposed to allow you to proceed and make your records and overrule the motion at this time, pro forma, but with the understanding that the Court will take the questions of the case up in the order in which they are presented and determine them in future. I think it will be conducive to the interests of all parties to have your record perfected. The motion by the defendants is therefore denied at this time with an exception to the defendants.

Q. State your name.

Mr. Bartlett: At this time we object to the introduction of any testimony for the reasons and on the grounds urged in the motion to dismiss.

112 The Court: Same ruling.

Exhibit "B"

Mr. Bartlett: To the offer of those proceedings under this last stipulation starting with petition of Blackman concerning Drainage Ditch No. 1 and 2, the defendants offer no objection. As to the offer of the proceedings of Drainage Ditch No. 1 and Drainage Ditch No. 2, the defendants object to the offer for the reason the proceedings are incompetent and irrelevant to the issues in this case. The same touching and concerning a project not here in controversy, the controversy here being an attempt to enjoin further proceedings of the Board of County Commissioners relative to Drainage Ditch No. 1 and 2. For the further reason that the offer does not present a federal question nor a matter subject to inquiry before this court in these proceedings, and all offers of instruments up to the establishment of the ditch not being the best evidence.

The Court: It will be received subject to objection.

113

Exhibit "C"

C. M. BASSETT, Assistant Engineer of the Great Northern, on the stand, examined by Mr. Judge.

Mr. Judge: State the substance of that conversation.

Mr. Bartlett: Objected to as not binding on the defendant Commissioners.

The Court: Objection overruled.

A. We have two bridges within the area and the said Bridge 150.7 that that bridge was about the right size. The bridge 146.0 we could shorten approximately 323 feet, and that he had capitalized that amount, but I didn't get the exact figures. He figured on the amount saved by shortening of the bridge.

Mr. Bartlett: At this time, if the Court please, the defendant objects and asks that the question be stricken, and objects to the testimony of this witness on behalf of the plaintiff, going to the proposition as to whether or not the plaintiffs are

benefited or not by the drainage project, for the reason the same is incompetent, irrelevant and immaterial to the issues in the case, for the further reason that the evidence now shows that the Board of County Commissioners of Minnehaha County had jurisdiction of the subject matter in these proceedings and proceeded with the construction reconstruction and the repair of the ditch in question. For the further reason that this Court has no original jurisdiction of the bill in equity to reject the method pursued by the Board of County Commissioners of Minnehaha County in the construction, reconstruction and repair of this ditch, and that the plaintiffs on the complaints herein have a plain, adequate and speedy remedy at law by appeal from the equalization arising from
114 proceedings taken by the Board of County Commissioners.

For the further reason that it calls for evidence of the facts the determination of which is in the exclusive jurisdiction of the Board of County Commissioners and has been decided by that tribunal, which decision is conclusive and cannot be inquired into by this Court. That it is an attempt to impeach the determination of that tribunal in this action without any allegation or proof of fraud or arbitrary action on the part of that tribunal. Is not within the issues of the case and not a proper subject of inquiry by these collateral proceedings and does not present a federal question.

May we have the record show that that objection goes to the testimony offered in behalf of the plaintiffs in these proceedings attacking the question of whether or not they are or are not benefited by the ditch proceedings?

The Court: Yes. The motion is denied. The testimony is received subject to objection.

115

Exhibit "D"

(At the close of plaintiff's case)

Mr. Bartlett: At this time, Your Honor, at the close of plaintiff's cases in chief, the defendant renews the motion to dismiss the bills of complaint in these cases and set aside the restraining order heretofore issued, for all the reasons and upon all the grounds urged in the motion made by the defendants at the beginning of these cases.

And for the further reason that the record now shows that notice of opportunity to be heard upon the amount or proportion of benefits these plaintiffs have received and the amount

or proportion of assessment that will be made against their property for such benefits has been given, and that all the plaintiffs in these cases have a plain, adequate and speedy remedy at law.

For the further reason that the record now shows that the method of apportionment of benefits and assessments to be made thereon as provided by the laws of South Dakota and applied by the Board of County Commissioners in these cases based upon their judgment of values and benefits conferred to the property of these plaintiffs in these cases and others, is a standard method of apportionment, which will probably produce substantial justice generally, and the probability is that the parties will be taxed proportionately to each other and all others upon whom benefits are conferred by the method provided and employed as shown by the evidence in these cases, and will probably produce approximately correct general results.

For the further reason that the record now shows the Board of County Commissioners of Minnehaha County charged by the law of this state with the execution of
116 the drainage ditch law has jurisdiction to proceed in respect to the property within such drainage area, including the property of these plaintiffs in these actions. And if there have been any errors in the administration of the statute, the same do not involve the jurisdiction of that tribunal over the property of these plaintiffs and others, and the record does not indicate upon its face any departure from the requirements of the statute. Therefore this Court cannot inquire into these collateral proceedings and the same are not issues presenting federal questions.

The Court: The motion is denied pro forma, without prejudice to its renewal at the close of all the testimony.

Endorsed: Filed in the District Court on Jan. 31, 1922, at 10 A. M.

118 (Order permitting amendment to bill of complaint.)

The above entitled matter coming on for hearing this 31st day of January, 1922, at 10 o'clock A. M., upon the order heretofore issued to defendants and intervening defendants to show cause why plaintiff should not be permitted to amend the bill herein to conform to the proof by adding to the Fifteenth paragraph of said bill the following:

“That the equalization of benefits of 616.85 units out of a total number of units of 32,549.62, amounting in dollars and cents to approximately five thousand eight hundred dollars (\$5,800.00) sought to be made by the Board of County Commissioners of Minnehaha County, South Dakota, 119 against the property of plaintiff, as above set forth, is wholly arbitrary, unjust, illegal and discriminatory and was made by the Board of County Commissioners without any reasonable or rational basis therefor, and upon a purely arbitrary and speculative basis, and is not in proportion to any benefit which the property of plaintiff has received or ever can receive by the re-building of the spillway and the cleaning out, repairing and maintaining of Drainage Ditches No. 1 and No. 2, as herein set forth; that the property of plaintiff has not been and never can be [benefitted] by the re-building of the spillway and the cleaning out, repairing and maintaining of Drainage Ditches No. 1 and No. 2, as herein set forth, to the extent of five thousand eight hundred dollars (\$5,800.00) or to any extent whatever, and that the assessment sought to be collected from plaintiff above set forth is out of all proportion to the assessment sought to be made upon the agricultural lands north of the city of Sioux Falls, for the benefit of which the said Drainage Ditches No. 1 and No. 2 were originally built; that the said assessment is so arbitrary and discriminatory against the property of plaintiff as to deprive plaintiff of its property without due process of law, and that it deprives plaintiff of the equal protection of the laws.”

Plaintiff appearing by its solicitor H. E. Judge, defendants appearing by their solicitor, E. O. Jones, and intervening defendants appearing by their attorneys, Porter & Bartlett, and the court being fully advised in the premises, and it appearing to the court that upon the trial of said action evidence was offered and received by and from all parties 120 to said action relative to the issue proposed to be raised by said amendment, and that in the furtherance of justice said amendment should be permitted.

Now Therefore, it is hereby Ordered that the motion to amend plaintiff's bill of complaint be and the same is hereby granted; that the amendment be made and filed nunc pro tunc as of the date of the trial of said action on the 15th day of December, 1921; that the amendment be made by attaching to the original bill of complaint a copy of the amendment and making it a part of the original bill; that the bill as amended need not be re-written in full; and that the answers of the de-

fendants and intervening defendants heretofore filed shall stand as answers to the bill as amended.

And the defendants and intervening defendants having asked permission to submit further evidence upon the issue set out in the amendment, it is further Ordered, that they may do so at any time within 10 days from the date hereof upon two days' notice to solicitor for plaintiff.

Done at Sioux Falls, in said District, this 31st day of January, 1922.

By the Court:

JAS. D. ELLIOTT

(Seal of Court)

Judge.

Attest:

Jerry Carleton
Clerk.

Endorsed: Filed in the District Court on Jan. 31, 1922, at 2. A. M.

122 (Exception of defendants to order allowing amendment to bill of complaint.)

January 31, 1922.

Come now the defendants, by their attorney, E. O. Jones, Esq., and the Intervening Defendants, by their attorney, N. B. Bartlett, Esq., and except to the Order permitting the amendment to the Bill to conform to the proof, which exception is allowed by the Court.

124 (Amendment to Bill of Complaint.)

Now comes the plaintiff and by leave of the court amends its bill by adding to the Fifteenth paragraph of said bill the following:

“That the equalization of benefits of 616.85 units out of a total number of units of 32,549.62, amounting in dollars and cents to approximately five thousand eight hundred dollars (\$5,800.00) sought to be made by the Board of County Commissioners of Minnehaha County, South Dakota, 125 against the property of plaintiff, as above set forth, is wholly arbitrary, unjust, illegal and discriminatory and was made by the Board of County Commissioners without any reasonable or rational basis therefor, and upon a

purely arbitrary and speculative basis, and is not in proportion to any benefit which the property of plaintiff has received or ever can receive by the rebuilding of the spillway and the cleaning out, repairing and maintaining of Drainage Ditches No. 1 and No. 2, as herein set forth; that the property of plaintiff has not been and never can be benefited by the re-building of the spillway and the cleaning out, repairing and maintaining of Drainage Ditches No. 1 and No. 2, as herein set forth, to the extent of five thousand eight hundred dollars (\$5,800.00), or to any extent whatever, and that the assessment sought to be collected from plaintiff above set forth is out of all proportion to the assessment sought to be made upon the agricultural lands north of the city of Sioux Falls, for the benefit of which the said Drainage Ditches No. 1 and No. 2 were originally built; that the said assessment is so arbitrary and discriminatory against the property of plaintiff as to deprive plaintiff of its property without due process of law, and that it deprives plaintiff of the equal protection of the laws."

H. E. JUDGE,
Solicitor for Plaintiff.

Endorsed: Filed in the District Court on January 31, 1922, Nunc Pro Tunc as of December 15, 1921.

127

(Opinion of the District Court.)

James D. Elliott, District Judge.

United States District Court, District of South Dakota.
Sioux Falls, S. Dak., Feb. 17th, 1922.

Chicago, Rock Island & Pacific Railway Company, a corporation, Plaintiff,

No. 98 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Chicago, Milwaukee & St. Paul Railway Company, a corporation, Plaintiff,

No. 99 S. D. vs. In Equity
A. G. Risty, Et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Chicago, St. Paul, Minneapolis & Omaha Railway Company,
a corporation, Plaintiff,

No. 100 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Inter-
vening Defendants.

Northern States Power Company, a Corporation, Plaintiff,

No. 101 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Inter-
vening Defendants.

City of Sioux Falls, a Municipal Corporation, Plaintiff,

128 No. 102 S. D. vs. In Equity.
A. G. Risty, et al., Defendants

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Inter-
vening Defendants.

Great Northern Railway Company, a Corporation, Plaintiff,

No. 103 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Inter-
vening Defendants.

C. O. Bailey, Esq., Sioux Falls, S. D. and others, Counsel for
Plaintiffs.

Messrs. Porter & Bartlett, and C. O. Jones, Esq., Sioux Falls,
S. D., Counsel for Defendants.

Gentlemen :—

I have finally disposed of the questions presented in the
various drainage ditch cases, consolidated for the purpose of
trial, and which were tried and submitted upon single record.

The question of the constitutionality of the South Dakota
drainage statute is pleaded by each plaintiff, and upon this
issue, the interests of the plaintiffs in all these suits are
identical. It is urged by the plaintiffs in the various suits
that the entire South Dakota drainage statute is unconsti-

tutional for the reason that it is in conflict with the Fourteenth Amendment of the Constitution of the United States.

129 Plaintiffs call the Court's attention to the provision of the Fourteenth Amendment that prevents the taking of property "Without due process of law."

If the South Dakota statute does not give the person whose land is to be assessed for the drainage of agricultural lands his "day in court", then there is no "Due process of law." I find upon investigation of the various drainage ditch statutes that almost universally the provision is made for the organization at the inception of the proceeding of a drainage district, with boundaries defined, organized after notice to all property owners within the district, and endowed by statute with certain powers consistent with the purpose for which the district is organized. I also note that ordinarily, where no provision is made for the formation of a drainage district, as is the case in this state, provisions are usually made for the notification of the property owners whose interests are supposed to be included in the drainage district, and for the giving to them of an opportunity to be heard in respect to the question of the practicability or feasibility of the drainage proposition, and whether or not the benefits will exceed the cost, and whether or not the particular lands of the owner, shall be included within the drainage district and assessed its pro-rata share of the benefits.

It is urged by the plaintiffs, and must be conceded, that in this regard the South Dakota statute differs from the drainage statutes of most other states. Section 8459, Revised Statutes of South Dakota, provides that a petition for proposed drainage may be filed with the Board of County Commissioners. This is the first step in the proceeding.

130 This petition is only required to set forth the necessity for the drainage, a description of the route, its initial and terminal points, and its general course, or of its exact course in whole or in part, and a general statement of the territory likely to be affected thereby.

Under this statute petitioners are not required to describe the specific tracts of land to be included within the drainage area, or which will be affected thereby or assessed therefor. Neither is it necessary to give the names of the owners of the property. The statute requires only a "general statement" as to the extent of the territory affected.

Section 8461 of said Revised Statutes, provides that the Board shall fix a time and place for the hearing of the petition and shall give notice by publication at least once each week for two consecutive weeks in a newspaper in the county, and by posting notices near the route of the proposed drainage. It also provides that such notice shall describe the route of the proposed drainage, and the tract of country likely to be affected thereby, in general terms, the separate tracts of land through which the proposed drainage will pass, and give the names of the owners thereof as appears from the records in the office of the Register of Deeds on the date of the filing of the petition. It is further provided that such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed.

131 Plaintiffs note that this statute, except as to property owners through whose property the proposed drainage will pass, provides only this general notice, and especially complain that it gives no property owner any notice that his particular tract of land is included among the lands affected by the proposed drainage, and insist that the notice is broad enough to take in each and every tract of land included within the boundaries of the county in which the drainage project is situated.

It is true that, other than this general notice, there is no notice whatever given to the property owner that his particular land is affected by the drainage proposition, or that he has any interest in it, or will be mulcted in assessment for benefits by reason thereof. He receives no summons or other notice, either by personal service or by mail. He has, however, the general notice given in the published summons by the Commissioners to "All persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed."

By Section 8461 of the said Revised Statutes, the County Commissioners pass upon the petition at the time named in the summons and notice, and if they find it feasible to establish the drainage, no provision is made for any other notice to any property owner, unless it should be found necessary to change the initial or terminal points so that the drainage will pass through other lands than those described in the original notice, or to increase the width of the lands to be taken for the proposed drainage, in which case the Board

132 must give the owners of such lands notice. There is no provision, however, for any notice to any property owner after the drainage ditch is established.

The Board may then proceed without further notice, to its construction. It may incur construction expense before taking any proceedings towards making an assessment for the payment of the costs, or it may before doing the work, estimate the costs and make an apportionment of benefits upon which the assessment may subsequently be spread by the County Auditor.

Section 8463 of said Revised Statutes authorizes the said County Commissioners, after establishing the drainage, to fix the proportion of benefits of the proposed drainage among the lands affected, and also appoint a time and place for equalizing the same. It is then provided that notice of such equalization of proportion of benefits shall be given by publication for two weeks. It is provided that this notice must give a description of each tract of land affected by the proposed drainage, and the names of the owners as appears from the records of the office of the Register of Deeds. It is further provided that the lands to be charged with benefits include all pieces of property that, in the judgment of the Board of County Commissioners are benefitted by the drainage proposition. At this hearing the Board fixes the proportion of benefits for each tract of land, taking any particular tract as a unit, and also fixes the benefit which any railroad company may obtain for its property by such construction and equalizes it together with the proportion of the benefits to tracts of land. This statute seems to provide
133 for this hearing for fixing the proportion of the benefits before the ditch is constructed and before it is known what will be the actual amount of money expended. This hearing may be delayed until after the ditch has been built. It also provides that in event there is further expense incurred, or if for any reason, parties assessed do not pay the tax, a new proportion of benefits shall be fixed and new assessments made.

At this hearing the owners of the lands alleged to be benefitted have notice, have the right to appear and contest the amount of the benefits upon their lands, and may even urge that no benefits are derived. From this assessment there is a provision granting an appeal to the Circuit Court of the County in which the lands are situated, in which the proportional benefit may be an issue, and the owner of the land, upon such appeal, may contest the fact that there are any

benefits to the land in question. The law further provides for an appeal from the determination of such issue in the Circuit Court to the Supreme Court of the State.

After such proportional benefits are determined the County Auditor spreads the tax and it then becomes a lien upon the property benefitted.

This brief statement of the provisions of the statute, not at all complete, but in a general way outlines the general powers of the Board and the method of the establishment of the ditch, and the various steps up to the spreading of the tax against the lands benefitted.

134 These proceedings are peculiarly limited to the drainage of agricultural lands, because the Constitution of the State of South Dakota provides that:

“The drainage of agricultural lands is especially declared to be a public purpose and the Legislature may provide therefor, and may provide for the organization of drainage districts for the drainage of lands for any public use, and may vest corporate authorities thereof and the corporate authorities of counties, townships and municipalities, with powers to constitute levees, drains and ditches * * * * * by special assessments upon the property benefitted thereby according to the benefits received.”

Pursuant to this provision of the Constitution, the Legislature of the State has provided for the drainage of agricultural lands, but nowhere is there any statutory enactment under which drainage districts may be formed for the drainage of lands “for any public use”. Without repetition, and calling attention now to the reasons urged by the plaintiffs sustaining the unconstitutionality of this statute enacted for the purpose of draining agricultural lands, and considering the objections urged in various forms by the different plaintiffs, we find that all of the objections center about the criticism that no notice is provided the owners of lands affected by the drainage ditch, except the general notice, and in fact, no personal notice until the date fixed by the Board for the equalization of proportional assessments for the various tracts of land

135 benefitted by the drainage. It will be noted that the Legislature has provided that no tax can become effective, no assessment can be made, until the benefits have been ascertained and proportioned, and before this can be done a definite day must be named by the Board and the various land owners are given notice.

The question resolves itself into one of whether or not this hearing after notice, with the right of appeal, constitutes "a day in Court" to the various land owners. I have reviewed the authorities submitted by plaintiffs and I am frank to confess that the statutes of this state do not provide for the description of the lands alleged to be benefitted by the ditch, or the owners of the lands, or that notice shall be given to such owners, or that the owners shall appear and show cause, if any they have, why the ditch is not practicable or should not be established, or have the opportunity to show that the cost would be greater than the benefits, or would be confiscatory, and yet, I am satisfied that the courts of the various states and the Supreme Court of the United States have recognized the power of the Legislature to provide the method of the levying of this tax against the lands benefitted by a drainage ditch, and have held that a law that provides for notice and an appearance and the right to contest the amount of the tax, and to contest the right to tax at all, with the right of appeal therefrom, if given to the land owner prior to
136 the time that a tax is levied and becomes effective, is "due process of law."

I was impressed upon the oral argument with counsel's reference to the decision in the North Dakota case, *Soliah vs. Heskin, etc.*, 222 U. S. 522. Counsel urged that the law of North Dakota, very similar to ours, was sustained because it provided for a notice at the time of the establishment of the ditch. Reference to this opinion demonstrates that the Court held as follows:

"Neither does that Amendment invalidate an act authorizing an appointed Board to determine whether a proposed drain will be a public benefit and create a drainage district consisting of land which it decides will be benefitted by such drain, and to make special assessments accordingly, if, as here, notice is given and an opportunity to be heard afforded the land owner before the assessment becomes a lien against his property.

(Underscoring is mine.)

Under the South Dakota statute, applying this rule as announced in the North Dakota case, clearly, the notice is provided and an opportunity to be heard is afforded the land owner before the assessment becomes a lien upon his property, in the drainage of agricultural lands.

Louisiana has held that:

“Whenever by the rules of the state or by state authority, a tax assessment, servitude or other burden is imposed upon property for the public use, * * * * * and those
137 laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice with such notice to the person of such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without ‘due process of law.’ ” Davidson vs. New Orleans, 96 U. S. 97.

Massachusetts has held that:

“If the legislature provides for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.” Spencer vs. Merchant, 125 U. S. 578.

Construing the statutes of the State of Missouri, it was held that:

“It is granted that the land owners were not afforded an opportunity to be heard in respect to the value of their land. While no hearing is given when the lands are appraised a hearing is given when the tax is sought to be enforced. The mode of enforcement is by a suit in a court of justice when owners aggrieved by the valuation may have a full hearing upon that question. This is due process of law.” Embree vs. K. C. & L. Road Dist. 240 U. S. 242.

The drainage statute of Michigan was considered in re Roberts vs. Smith, 72 N. W. , and also in Gillette vs. McLaughlin, 37 N. W. 551, and in Smith vs. Carlo, 72 N. W.

22. In these cases the same objections were made to
138 the constitutionality of the law that are argued by the plaintiffs here, and especially that the persons who did not own lands traversed by the drain, but who are within the assessment district, have no opportunity to be heard upon the necessity for laying the drain. And, further, that persons within the assessment district are entitled, under the constitution, to a hearing upon the question of the public necessity for the drain. These contentions were denied in these cases, the law held constitutional, and a full discussion of the questions is to be found in these cases and the cases therein cited.

The Michigan statute is construed again in *re Voight vs. Detroit*, 82 N. W. 253, and on appeal, 184 U. S. 115, in which it was urged that no provision is made for a notice to property owners of the time and place of hearing upon either the question of fixing the taxing district or the amount of the award to be spread thereon. This, it is claimed, leads to taking property without due process of law, and therefore the law is unconstitutional. It was claimed in this case, by counsel, that the complainant was entitled to notice of the hearing relating to the establishment of the assessment district, and of the amount of the total assessment, and because the statute did not provide for these notices it was unconstitutional. It was held in this case that this position could not be maintained.

“The provision of law by which, when the proceeding has reached the stage where it is proposed to levy the tax, a notice must be served on the property owner, was held sufficient to avoid the constitutional objection, notwithstanding no
139 notice is required in respect to the creation of the district or the determination of the aggregate amount of the tax to be collected.

In *re Paulson vs. Portland*, 149 U. S. 30 it is held:

“It is settled that if provision is made for notice to and hearing of each proprietor at some stage of the proceedings upon the question, What proportion of tax shall be assessed upon his land, there is no taking of his property without due process of law.”

I repeat that under the South Dakota statute there is ample provision for notice to every land owner, and an opportunity given to be present at the hearing, at which time and place he may assert all objections against the validity and justice of the proposed charge upon his property before the tax is levied, and carried by the County Auditor as such on the books of his office and made a lien upon the property. It follows that, in my judgment, the South Dakota [statutes], enacted in the light of that provision of the Constitution of the State providing for the drainage of agricultural lands, is constitutional.

The case made by the bills filed by the plaintiffs in these various actions involve a real and substantial question under the Constitution of the United States. The amount involved in each case is greatly in excess of Three Thousand Dollars,

exclusive of interest and costs. On the question of the jurisdiction of this Court, I am of the opinion that each
140 plaintiff states a case in his bill plainly cognizable in this court. All of the plaintiffs except the City of Sioux Falls allege diversity of citizenship, in addition to the Constitutional question, and the proper amount involved. I repeat that there can be no question as to the bills involving a real and substantial question under the Constitution of the United States, and in such a case the jurisdiction of this Court extends to every question involved, whether of Federal or State law, and enables the Court to rest its judgment or decree on the decision of such of the questions as in its opinion effectually dispose of the cases. *Davis et al. vs. Wallace et al.* (Opinion Jan. 9, 1922,.... U. S. with cases there cited).

It conclusively appears on the face of these pleadings that there is no speedy or adequate remedy at law. The remedy at law must be a remedy on the law side of the Federal Court, not a remedy in the State Courts of South Dakota. In each of the cases where there is a diversity of citizenship, this Court of Equity will not deny the plaintiff relief because there may be a remedy in the courts of the state, for the reason that the non-resident is not required to subject himself to jurisdiction of the Courts of the State in order to obtain relief. *U. S. Life Ins. Co. vs. Cable*, 95 Fed. 761.

In neither of the cases at bar is there a remedy at law on the law side of the Federal Court. If plaintiffs, or either of them are compelled to pay this tax, no action would lie on the law side of the Court that would give them relief. No
141 action on the law side of the Court would protect them, or either of them, from future assessments and future responsibilities.

There is the further issue presented on the face of the bills, that for the reasons therein stated, no Drainage Ditch No. 1 and 2, under which it is pretended this assessment is made, was ever established. That this is simply a pretense for the maintenance and repair of the ditches that had been theretofore established, and that the steps that have been taken by the County Commissioners are without authority of law. In substance, that the Board of County Commissioners are trespassers, acting with no right or color of right. That insofar as there is an attempt to assess benefits to the property of the plaintiffs, or other property in the City of Sioux Falls, the proceedings are entirely void. That as to each of the plain-

tiffs the assessment of benefits made is arbitrary, unjust, illegal and void. This is the basis of the claim that the assessment is such as to result in the property of the plaintiffs bearing more than its share of the burden of improvements while such property is in no wise benefitted thereby. That the alleged benefits from this improvement have not been estimated upon these properties with the farm lands according to any standard which will produce approximately correct general results. That the taxes upon the plaintiff's property are upon some fanciful view of future benefits, while the farm
142 property is assessed wholly according to its area and position. That the property of the respective plaintiffs is sought to be burdened for this improvement upon a basis so wholly different from that used for ascertaining the contribution demanded from individual owners of agricultural lands adjacent to the drain, as necessarily to produce manifest inequality. That the plaintiffs are therefore deprived of the protection of the law which must be extended to all.

The determination of these various issues necessarily requires a consideration of the facts as they appear in the record. Fortunately there is practically no dispute as to the facts. The only dispute is as to the legal effect of the acts of the Board of County Commissioners.

What, then, was the situation at and prior to the time that the said Board assumed authority to require the plaintiffs and others in the City of Sioux Falls, to pay for the building of this new spillway, and the repair of the ditches hereinafter referred to? The Sioux River flows from the north, in a southerly direction, west of the City of Sioux Falls, then flows in an easterly direction, south of the main portion of the city, then flows north through the city of Sioux Falls, flowing a distance of some ten miles from a point north of the city where the drainage ditch hereinafter referred to leaves the river, to a point where the drainage ditch empties its waters into the river. The river thus describes a large horse-shoe, the drainage ditch cutting across the open end,
143 practically from the river on one side to the river on the other. Dell Rapids is situated in the Sioux Valley more than twenty miles north of Sioux Falls.

At first there was established Drainage Ditch No. 1, and then Drainage Ditch No. 2. These two ditches extended from a point north of the City of Sioux Falls some distance to a point some fifteen miles north of Sioux Falls, at which point

Drainage Ditch No. 2 was intended to take the flood water from the Sioux River and conduct it down its length into and through Drainage Ditch No. 1, to the river north of Sioux Falls, cutting through the hills adjacent to the river, and necessitating the conduct of the water down a fall of more than one hundred feet into the river. Drainage Ditch No. 1 and Drainage Ditch No. 2 were duly constructed under the provisions of the Constitution and laws of the state for the drainage of agricultural lands and were operated for the purpose for which they were constructed. The first petition for said Drainage Ditch No. 1 was filed in 1907, and the petition for Drainage Ditch No. 2 was filed in 1910. Such proceedings were had that these two ditches were constructed down the valley in a southerly direction, near the Sioux River until a point was reached north of the City of Sioux Falls, when the ditch was turned in an easterly direction across to the Sioux River at a point north and east of the City of Sioux Falls. Benefits were assessed and paid by the owners of adjacent lands under the provisions of the statutes of the State of South Dakota to which I have referred. In 144 1915 the force of the waters conducted by these two drainage ditches was so great as to wash out what is called the spillway, through the bluff adjacent to the point where the waters from the ditches entered the river. The ditches in the meantime also became out of repair, and at one point several miles above the City where the ditch approached the river, the water was cutting from the river into the ditch, threatening to turn the entire course of the Sioux River at this point into the ditch, and through the ditch back into the river, leaving the Sioux River from that point and for about twelve miles around to where the ditch flowed into the river, without water. The spillway from the ditch through the bluff down into the river was so unskillfully, inefficiently and unscientifically constructed that it would not stand the force of the water with a fall of one hundred feet into the river. It was washed out, and the bluff being of soil and sand, washed out of the entire depth of the river and began washing back through the bluffs, threatening to cut clear back to a point where the water cut through from the river to the ditch, thus taking away from the City of Sioux Falls the benefits of the river, its sewer system and the advantages of the stream, and take the water from the plaintiff, The Northern States Power Company, that naturally flowed down the river except for the interference by this drainage ditch. And in the cutting into this bluff also threatened to cut into the gravel bed in which the water supply of the City is located, a few

miles west of it, and thus drain and destroy and take away from the City of Sioux Falls, its water supply. This was the situation in 1916.

This situation presented no question of the
145 drainage of agricultural lands. The people who had been responsible for the establishment of these two drainage ditches and the conduct of the water down through the hill to the river below, because of the inefficient manner in which the spillway had been constructed, had caused all of the trouble. The thing that confronted the Board of County Commissioners at that time, having charge of these two drainage districts, was the maintenance of the ditches and of the spillway which was a part of the ditch that had already been constructed. In the construction of these ditches no suggestion had ever been made that the City of Sioux Falls, all lying entirely south of the districts drained, was in any manner interested in the drainage, or that there could be any benefits assessed to such city or any property owner thereof. The situation that confronted them was not drainage of agricultural lands, it was the maintenance of the ditches that had been established by them, and the prevention of the dangers threatened by the water that they were conducting down through these ditches, through this hill, into the river. They might have taken their chances upon the damages that their acts were responsible for, and let the river cut down through the ditch that they had constructed and turned the course of the river there and taken the water away from the City of Sioux Falls entirely, and exhausted and destroyed the City's water supply, and destroyed the power of the plaintiff, the Northern States Power Company, by taking the water from the stream at the point where the power plant is located, without in any way endangering the agricultural lands along this ditch, except so much of it as would be
146 washed away in forming this new bed of the river. I apprehend that we may reasonably find from the evidence here that such a cut-off in the river would be to the advantage of the land owners and prevent floods, so that it was not the drainage of the lands that was bothering the Commissioners, it was not the purpose to drain agricultural lands that impelled the Commissioners to act; the thing that impelled them to give this situation any consideration was the dangers that were threatened by reason of their having constructed these two ditches, and an effort to stop the ravages of the water they were conducting down there, by the construction of a substantial, adequate spillway. It was also

necessary for them, in order to stop this threatened danger, to stop the ravages of the water at the point where it was cutting into their ditch. Certainly, this condition never could have existed if they had never built the ditch. They were responsible for it and it was their duty to maintain the ditch and to stop the ravages of the water cutting into it and through it.

This was one of the questions that they had before them, one of the problems that they had to solve, and they did proceed to construct this spillway in a substantial way and to dike, and with cement to hold the water in the stream at the place where it was cutting into the ditch. The statutes of the State of South Dakota specifically provide the duty and the method for the maintenance of these ditches. Section 8470 of the said Revised Statutes, provides as follows:

“Assessments for maintenance. For the cleaning and
147 maintenance of any drainage ditch established under the provisions of this article, assessments may be made upon the land owners affected, in the proportion determined for such drainage, at any time, upon the petition of any person setting forth the necessity therefor, and after due inspection by the Board of County Commissioners.”

When this river cut through into the ditch, when the ditch became clogged in places and was not wide enough in others, when the spillway washed out by the force of the water they were conducting down the ditch, and the cutting of the bluff began and large areas of land were being washed away, and the other dangers were threatened, there was only one proposition presented to the Commissioners, and that was one of maintenance; was one of taking care of the water that they were conducting down these two ditches, No. 1 and No. 2.

Instead of proceeding frankly to maintain the ditches they had established in the manner provided by statute; instead of carrying out the obligations they had assumed when they brought the water down through these ditches, and attempted to deliver it through this bluff into the river; instead of proceeding regularly under this statute to do that which it was their duty to do; instead of performing the obligation that they had assumed when they established the ditches, that of maintaining them, they proceeded to act upon the assumption that because they had conducted the water down into these
148 ditches, and because of the inefficient manner in which they had constructed the ditches and built the spillway, and all of these dangers were threatened, there-

fore, the plaintiffs, and others in Sioux Falls, were necessarily to be damaged. And, although a proper maintenance of these two ditches, No. 1 and No. 2, would stop the damage, would prevent any danger, the Commissioners evidently reasoned that because the plaintiffs and others in Sioux Falls were in danger, they must pay for the repair of these ditches. That could not be done by simply saying the ditches shall be repaired and the City of Sioux Falls, the plaintiffs, and others, shall pay for it, or pay a part of it, and therefore, they proceeded to do indirectly what it was conceded they could not do directly. In other words, they then began to look around and see what they would do in the way of taking care of the water and stopping these dangers.

At first it was proposed to change the spillway and conduct the water down in a southerly direction, through a slough or lake, into the river west of the City, and save the great fall that is involved at the point where the water enters the river from the spillway northeast of the city.

This was abandoned and they finally then pretended to act under a statute authorizing the abandonment of ditches. As a matter of fact there was no abandonment in good faith. No attempt to abandon the ditches. In fact, the reading of the resolution shows it was simply that they abandoned the spillway. That they filed a petition which was headed, "To reconstruct and improve Drainage Ditches No. 1 and No. 2, Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches No. 1 and No. 2, and to pay therefor by assessment 149 upon the property, persons and corporations benefitted thereby."

This petition was filed in July, 1916, with the Board of County Commissioners. There had never been an abandonment of Ditch No. 1 and Ditch No. 2. There had been a pretended abandonment of the spillway. But the Commissioners proceeded then to construct a proper spillway on the identical location of the old one. In other words, no change whatever was made in the two ditches, No. 1 and No. 2, except to properly construct an efficient, adequate, substantial spillway, and prevent the river cutting from its bed into the ditch, cleaning out the ditch and repairing it, changing the gates at the head of the ditch where the flood waters were taken from the river.

Upon this petition, for this purpose, the Board of Commissioners assumed authority and power to re-christen this

Ditch No. and Ditch No. 2, and call it Ditch No. 1 and 2, and for the purpose of making these repairs and maintaining the old ditches under the new name, proceeded as if no ditch had been established, and as if the Ditches No. 1 and No. 2 were not in existence, and as if no obligation had been assumed by the drainage districts when they diverted the water down through the bluffs to the river, and proceeded to make the repairs and to reach out and say that the various plaintiffs were benefitted. Instead of charging the repairs and [maintenance] of the ditches to those who were responsible for their construction under the provisions of the statutes above referred to, the Commissioners proceeded to assume
150 the right and authority to constitute a new drainage ditch without any abandonment of the old ditches, with no thought of using new or different drainage in any way, except to maintain them and to perfect that which had been inefficiently constructed, with no thought or purpose except to repair the damage that had already been done, and prevent future damage.

Under these circumstances, I am of the opinion that the Commissioners were acting entirely without authority of law. There is no provision in the statutes of the State of South Dakota for the taking in of any other lands and assessing them, for the maintaining of a ditch after it has been constructed, and the benefits of its building have been assessed.

I am of the opinion that the forming of this new ditch was simply a pretense, and that the plaintiffs' pleading that it was a subterfuge is supported by the proof, resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed.

I am of the opinion that Section 8489 of said Revised Statutes, in regard to invalid and abandoned proceedings is not applicable to any situation such as existed here. That section has reference to the abandonment of a ditch that has been enjoined, vacated, set aside or declared void, and specifically provides for the re-establishment of a ditch over the same territory, and that the new ditch shall assume the expenses paid on the old ditch, and give credit for any payment
151 made upon the old ditch by people benefitted. No such proceeding was attempted to be followed in this case. The proceedings establishing old ditches No. 1 and No. 2 have never been held void, never been set aside, never been abandoned. They are in force today and are responsible for

the manner in which the ditches were constructed and for any damages that result from their negligence.

Under these circumstances the Board of County Commissioners had absolutely no authority, no right or color of right, were not acting under the provision of any statute of the State when they assumed the right to reach out and attempt to assess the benefits for the repair and [maintainence] of said ditches against the property of the various plaintiffs. They were mere trespassers, for the reason that no drainage Ditch No. 1 and 2 was ever establised and has no existence.

I am of opinion that the proceedings of the Board of Commissioners in the repair and [maintainence] of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it District No. 1 and 2, and to assess benefits to the property of the plaintiffs, insofar as they are located in the City of Sioux Falls, are void. Entertaining this view it follows that plaintiffs' prayer for an injunction should be granted.

I may suggest in conclusion, however, that even if the Court had found that Drainage District No. 1 and 2, was legally constituted, and that the Board of County Commissioners had the right to extend the benefits to property within the City of Sioux Falls, the proofs overwhelmingly bring the plaintiffs within the rule recently expressed in re Thomas
152 et al. v. Kansas City Southern Railway Co., et al. (December term A. D. 1921, . . . Fed. . . .) in that the taxation that is imposed upon each of the plaintiffs is a much higher rate, and upon a different basis, than the tax upon land lying within the district. As a matter of fact no direct benefits to the property of the railways within the city are shown. It is further shown that the benefits estimated upon the plaintiffs' property were upon no standard that would probably produce results approximately the same as those upon the land in the drainage district. Taking, for instance, the tax upon one of the plaintiffs, the City of Sioux Falls, for its miles of streets in the City of Sioux Falls, with no pretense that there is any method of taxation or measuring a benefit or a gain, that would produce even approximately correct general results, when considered with benefits to the lands in the district. Simply a vague, indefinite generality, indulged in by the engineer and adopted by the Board. Benefits purely fanciful, with no substantial basis. Take the railroads, different plaintiffs, there is no pretense that the basis used had any relation to that used in fix-

ing the value upon the lands in the district. It is admitted that the basis was wholly different from that used for ascertaining the contribution demanded of individual owners, and I find that such difference necessarily produces manifest inequality. There is an entire absence of the equal protection of the law that must be extended to all.

Referring to the testimony showing the manner of making assessments and the amount, in a general way: I think it fairly appears from the record in the case that the contention of the plaintiffs that the attempt to assess the property of these plaintiffs was an afterthought. It, in my judgment, is established that they could not be benefited, even admitting that this was a genuine drainage ditch for the purpose of draining agricultural lands, under the circumstances outlined in the evidence, there is no reasonable ground upon which the action of the Board could be predicated. There is no pretense in this record that the railroad companies were treated like owners of agricultural lands. The discrimination is palpable, and the amount assessed simply an arbitrary assessment. These plaintiffs were not attempted to be assessed in any manner contemplated by the statute, for the payment of the costs of draining agricultural lands. The plaintiff, Chicago, Rock Island & Pacific Railway Company, is simply arbitrarily assessed Eight Thousand Dollars, in raising a total of Three Hundred Thousand Dollars. The Northern States Power Company was assessed Fifty Thousand Dollars, one fifth of the entire expense although there is included in the pretended district agricultural lands something like twenty miles in length and several miles in width. The injustice of this is apparent when it is noted that the record disclosed that it was located upon the rapids of the Sioux River, in the City of Sioux Falls, had been located there for many years. It was, therefore, entitled to the water that naturally flowed down the stream to the end that it might secure power requisite for the conduct of its business.

The injury that was to be remedied by this improvement was one that had been caused by Drainage Ditch No. 1 and Drainage Ditch No. 2, one that could not have existed but for the establishment of those ditches. The duty to maintain these ditches involved the duty to repair the break from the banks of the river, and the duty to prevent the taking of the water from the river, that would, or should, naturally flow therein to plaintiff's benefit.

Even if there had been a valid establishment of a drainage ditch at the time and place in controversy, and even if the Board of County Commissioners had jurisdiction, there was an entire failure to present any evidence upon which any benefit could possibly be predicated against this plaintiff. The engineer who pretended to work out the hypothetical benefit admitted that he was not a hydro-electric engineer, and therefore, not able to analyze and state the result of the different conditions of the water in the river. The suggestion applies with special force to the status of this plaintiff that the amount of benefits were fanciful, exorbitant and arbitrary, with no possible appreciation in the value of its property as a result of this improvement, and it is self-evident that upon no basis that can be used and applied to all of the property tributary to this ditch, could Thirty Thousand Dollars be ascertained as the reasonable contribution to be demanded of this particular plaintiff.

These suggestions are applicable in a general way to the attempted assessment of the property of all of the plaintiffs, and I am of the opinion that the plaintiffs have all properly invoked the aid of this Court from an arbitrary, unwarranted exercise of power by the Board of County Commissioners of Minnehaha County, who, without due process of law or compensation, threatened to deprive them, and each of them, of their property. What I have said, I think, should apply with equal force to all property in the City of Sioux Falls, attempted to be assessed by the Board of Commissioners for the maintenance of this ditch under the name of a new ditch. The responsibility for the maintenance of this ditch, for the repair of the break from the river into the ditch, and the change of the head gates, and the cleaning out of the ditch, and the repair and reconstruction of the spillway, was, and is, upon the two drainage districts responsible for their construction and maintenance, and the amount expended, some \$250,000.00, which, with interest, now amounts to \$300,000.00 or more, is a charge upon those districts to be assessed and made a lien upon the property within the districts, assessed in the proportion and collected in the manner, provided by the statutes of the State of South Dakota for the maintenance of drainage ditches.

There is another and further suggestion. I am of the opinion that this reconstruction of the old spillway without change of location, the repair of the break from the river into the

ditch, the cleaning of the ditch, the change of the head gates where the flood waters are taken from the river, everything that was done under this pretended establishment of a new ditch, could not be viewed in the same light or as serving the same purpose as the construction of the original
156 ditches, because the thing that caused the Board of Commissioners to take any action with reference to the condition that then existed was the danger that existed because of the conduct of the water down through these two drainage ditches to and through this spillway. The danger that was threatened was not that the agricultural lands would not be drained, but that immense damage was threatened, that the course of the river was to be diverted to this cut-off, that great areas of land were threatened to be cut away by this river one hundred feet deep, that the water supply of the City was threatened to be taken away because of this drainage ditch and this imperfect spillway. Because the water was to be taken from the river and all of the benefits of the river for several miles, through and around the City of Sioux Falls would be destroyed. The power of the Northern States Power Company would be destroyed by taking the water from the river. If it had not been for those conditions, for these threatened dangers, no action would have been taken, the ditches would have continued to function as they had functioned before. If the spillway had been properly constructed originally, and if it had not proven inadequate, there would have been no cause for any action by the Board in the year 1916. Every consideration that impelled action by the Board was some phase of the threatened danger by reason of the inadequate and imperfect construction and [maintain-
157 ence] of these two ditches. Neither of these considerations that influenced the action of the Board had anything to do with draining agricultural lands.

It may be said that to remedy these wrongs constituted a public use, as referred to in the Constitution of the State of South Dakota. Admitting that that is true, we are confronted with the proposition that there has been no legislation conforming with the provisions of the Constitution, authorizing the Legislature to provide for the establishment of drainage ditch districts, and the naming of officers with the powers therein referred to. If, therefore, any claim were made that the Commissioners were acting under this authority, independent of the provision of law with reference to the drainage of agricultural lands, the answer is that the provision of the Constitution is not self-executing, and that no legislation has been

provided carrying this provision of the Constitution into effect.

You may prepare proper orders in each case granting plaintiff an injunction as to all property located in the city of Sioux Falls and all Property not within the old Drainage District No. 1 and Drainage District No. 2. Provide an exception in behalf of the plaintiffs to the order of the Court denying the plea of the unconstitutionality of the drainage statute as applied to agricultural lands and the defendants a general exception to each order.

Yours truly,

JAS. D. ELLIOTT
U. S. District Judge.

Endorsed: Filed in the District Court on Feb. 23, 1922,
at 4:15 P. M.

160

(Decree, February 28, 1922.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

Great Northern Railway Company, Plaintiff,
No. 103, S. D. vs. In Equity.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Channock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,
and

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Security Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls

Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe, and W. G. Porter, Intervening Defendants.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was Ordered, Adjudged and Decreed as follows, viz: that the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock, as County Commissioners of the County of Minnehaha, and State of South Dakota, their agents, servants, employes, attorneys, and successors in office, and each and every of them, be and they are hereby forever restrained and enjoined from making any apportionment of benefits upon the following described property of the plaintiff herein, Great Northern Railway Company, situated in the county of Minnehaha, state of South Dakota, to-wit: Tract Eleven (11) of the Southeast Quarter (S.E. $\frac{1}{4}$) of Section Sixteen (16), in Township One Hundred One (101) North, of Range Forty-nine (49), West of the Fifth Principal Meridian, and right of way, tracks, embankments, and bridges across Sections Twenty-seven (27), Sixteen (16) and Thirty-one (31), in Township One Hundred One (101), Range Forty-nine (49), West of the Fifth Principal Meridian, for the construction of the spillway, dams, retaining gates, ditches, and for all other work done or that may hereafter be done under the supervision of the Board of County Commissioners of Minnehaha County, South Dakota, in the matter of the construction or re-construction, repair and maintenance of Drainage Ditch No. 1 and Drainage Ditch No. 2, otherwise designated by said County Commissioners as Drainage Ditches No. 1 and No. 2 and as Drainage Ditch No. 1 and 2, of Minnehaha County, South Dakota, and they and each of them are hereby perpetually restrained and enjoined from making and levying any assessment upon said property or any part, parcel or portion thereof, for the cost of the construction or re-construction, repair, maintenance of the said spillway, dams, retaining gates, ditches, and other work heretofore done or which may be hereafter done, or any part thereof, upon the said drainage ditches above referred to, or any of them, and from in any manner including any of said property of the plaintiff, Great Northern Railway Company, within the territory benefitted by said drainage ditches or any of them.

And the defendant, Fred E. Ward, as Auditor of the County of Minnehaha, and State of South Dakota, his agents, servants, employes, attorneys, and successors in office are hereby forever restrained and enjoined from making any such ap-

portionment of benefits, or making or levying any such assessment upon any of said property, and from certifying any such assessment to the county treasurer of the said county of Minnehaha, state of South Dakota.

162 And the defendant, J. O. Anderson, as Treasurer of the County of Minnehaha, and State of South Dakota, his agents, servants, employees, attorneys, and successors in office are hereby forever restrained and enjoined from filing any such assessment and from collecting any such assessment against the said property hereinbefore described.

It is further Ordered, Adjudged And Decreed that the plaintiff herein, the Great Northern Railway Company, have and recover from the defendants and intervening defendants herein, and each of them, its costs and disbursements herein taxed and allowed in the sum of dollars (\$.....), the amount thereof to be inserted herein by the clerk of the court after the costs shall have been taxed by him).

Done in open Court, at Sioux Falls, in said Southern Division of the District of South Dakota, on the 28th day of February, 1922.

By the Court:

JAS. D. ELLIOTT,

(Seal of Court)

Judge.

Attest:

Jerry Carleton,
Clerk.

To the entry of the foregoing decree, the defendants and the intervening defendants duly and severally excepted, which exceptions are allowed by the court.

Dated February 28, 1922.

JAS. D. ELLIOTT, Judge.

163 Endorsed: Filed in the District Court on Feb. 28, 1922, at 3 P. M.

164 (Assignment of Errors.)

And now, on this 25th day of August, A. D. 1922, come the defendant, by their Solicitors, Elbert O. Jones and L. E. Waggoner, and the intervening defendants, by their Solicitor, Norman B. Bartlett, and say that the decree entered in the

above entitled cause on the 28th day of February, A. D. 1922, is erroneous and unjust to the defendants.

First:

Because plaintiff's bill of complaint herein does not set forth any matter of equity entitling the plaintiff to the relief prayed for and it affirmatively appears from said
165 bill of complaint that the plaintiff has a plain, adequate and complete remedy at law.

Second:

Because the bill of complaint does not set forth any matters of equity in addition to the pretended constitutional question, or any special circumstances to bring the case under some recognized head of equity jurisdiction, and it is necessary to allege and prove some special circumstances in addition to the constitutional question, and thereby bring the case under some recognized head of equity jurisdiction, in order that this Court shall have jurisdiction of said matters.

Third:

Because the bill of complaint fails to set forth facts sufficient from which this Court can infer or presume that there will result a multiplicity of suits, irreparable injury, or a cloud cast upon the title of its property, and it is necessary to specifically allege facts from which this Court can infer that either a multiplicity of suits, irreparable injury or a cloud will be cast upon the title of its property as a direct result of the action that plaintiff is attempting to enjoin, and such allegations must be specific allegations of fact, and not conclusions.

Fourth:

Because it affirmatively appears from the fact of plaintiff's bill of complaint, and the record herein, that there is no jurisdictional amount in controversy in this case at this time, and can be none, and that, therefore, this action is prematurely brought, for the reason that no assessment, levy or tax has been, in fact, made, assessed, equalized, fixed or levied against the property of the plaintiff, or at all.

Fifth:

Because it affirmatively appears from plaintiff's bill
166 of complaint, and the record herein, that the State Tribunal having jurisdiction of said drainage ditch proceedings, was enjoined by this proceeding before such State

Tribunal had had an opportunity to perform its statutory duty to determine, equalize, assess, fix or levy the amount of benefit, assessment or tax, if any, chargeable against the property of the plaintiff, and for this Court to maintain jurisdiction before such State Tribunal had performed its full statutory duty, determined, equalized, assessed and fixed the amount of benefit, assessment or tax, was a usurpation of the authority invested in the State Tribunal, and an attempt to substitute this Court for such State Tribunal; and for the further reason that there is no provision of law giving this Court original jurisdiction over said matters.

Sixth:

Because the allegations of plaintiff's bill of complaint herein involve and present for litigation the determination of facts and matters controlled and governed by the drainage statutes of South Dakota, which, by their terms, create and provide a special tribunal with exclusive original jurisdiction to try and determine the questions presented in said bill of complaint, which determinations of said State Tribunal are final and conclusive upon this Court in this action, for the reason that this Court has no original jurisdiction by a bill in equity, to direct, reject, or control the proceedings and determinations of that tribunal, and thereby take away from that tribunal the power of discretion, and the exercise of its judgment in arriving at a proper determination of the matters before it.

Seventh:

Because until the tribunal created by the drainage statutes of South Dakota has exercised its judgment and discretion in the determination of questions of fact properly before
 167 it, and the necessary steps of procedure have been taken, and it has finally determined, equalized and fixed the proposed tax or assessment, if any, against the plaintiff's property, this Court has no jurisdiction over the subject matter set forth in plaintiff's bill of complaint, for the reason that until such proposed assessment, tax or servitude has been equalized and fixed and assessed, this action is premature.

Eighth:

Because the undisputed evidence shows that on or about December 4, 1920, an equity suit was instituted in the State Circuit Court, within and for Minnehaha County, South Dakota, the same being a court of general jurisdiction and having jurisdiction over the subject matter therein presented,

by one Oluf O. Gilseth, being a person belonging to the same class of persons as the plaintiff herein, whose lands were affected by the construction of Drainage Ditch No. 1 and 2, and against whose lands the proportion of benefits for the construction of said ditch had been proportioned at the same time, upon the same basis, and in like manner and under the same law as the proportion of benefits to the land of this plaintiff, which said action was brought by said Oluf O. Gilseth for himself, and as a representative of the class to which he and this plaintiff belong, and which action was brought against the defendants herein, and was instituted, tried and determined with notice to and knowledge by, approval, acquiescence and consent of this plaintiff, its officers, agents and attorneys, and in which said case the same facts were alleged and relied upon in the bill of complaint of the said Oluf O. Gilseth as are alleged and relied upon by the plaintiff herein in its bill of complaint, and which bill of complaint prayed for the same relief, and which said action came on for

trial, in which trial this plaintiff was entitled to be
168 heard, on the 31st day of January, 1921, and thereafter said State Court entered its judgment and decree dismissing said action upon its merits, and denying the plaintiff the right to an injunction against these defendants, which said judgment and decree is now in full force and effect, and which determination is binding upon this plaintiff, and is, therefore, a bar to this action, for the reason that all matters presented by plaintiff's bill of complaint herein are res adjudicata.

Ninth:

Because the uncontradicted evidence in this case shows that the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, and upon which the drainage ditch designated as Drainage Ditch No. 1 and 2, was ordered established and constructed, and the notice of hearing said petition given pursuant to law, and the resolution of the Board upon the hearing of said petition establishing said ditch, all contained a description of plaintiff's property, and alleged that the same was affected thereby, and said resolution determined that plaintiff's property so described was affected by said Drainage Ditch No. 1 and 2, which determination, unappealed from, is now final and conclusive upon this plaintiff, and this Court, and, therefore, this Court was unwarranted in determining and decreeing that plaintiff's property is not affected by Drainage Ditch No. 1 and 2, no extrinsic fraud being alleged in plaintiff's bill of complaint.

Tenth:

Because the undisputed evidence in this case shows that the plaintiff's property is receiving some benefit, and that it has not exhausted its statutory remedy for an equalization of such benefits, and its only complaint is that too many units of benefit have been apportioned against its property; and, therefore, this Court has no jurisdiction under its general equity powers to correct an unequal or unjust assessment, since the statute prescribes a method for reviewing or correcting unequal or unjust assessments.

Eleventh:

Because under the undisputed evidence in this case, the resolution of the Board of County Commissioners of Minnehaha County, South Dakota, dated October 3, 1916, duly and legally established the said drainage ditch, and therein designated it as "Drainage Ditch No. 1 and 2", and found and determined therein and thereby that said ditch was a new project, with plaintiff's property included therein, which finding and judgment of said Tribunal are binding upon this plaintiff and upon this Court, and can not be attacked in this collateral action, for the reason that said Tribunal is, by the drainage law of the State of South Dakota, given jurisdiction to determine the nature, kind and character of the proposed drainage, and the description of and the amount of property affected by said drainage project, and having made said findings and judgment, and this plaintiff not having appealed therefrom, said plaintiff is now bound thereby.

Twelfth:

Because under the undisputed evidence in this case, the resolution of the Board of County Commissioners of Minnehaha County, South Dakota, dated October 3, 1916, duly and legally established the said drainage ditch, and therein designated it as "Drainage Ditch No. 1 and 2", and found and determined therein and thereby that said ditch was conducive to the public health, convenience and welfare of the territory described in the petition of the City of Sioux Falls, F. L. Blackman and others, and was necessary and practicable for draining agricultural lands, which findings and judgment of said Tribunal are now binding upon this plaintiff and upon this Court, and cannot be attacked in this collateral action, for the reason that, by the drainage law of the State of South Dakota, the Board of County Commissioners are given authority to determine whether or not a proposed drainage ditch will or will not be conducive to the pub-

lie health, convenience and welfare of the territory described in the petition therefor, or necessary and practicable for draining agricultural lands; and having found in the affirmative in both instances, and the plaintiff herein not having appealed from such determination, the same is now binding upon this plaintiff and upon this Court.

Thirteenth:

Because no facts have been alleged in plaintiff's bill of complaint constituting extrinsic fraud on the part of the Board of County Commissioners of Minnehaha County, South Dakota, or any one else, in filing the petition of the City of Sioux Falls, F. L. Blackman and others, or in the allegations contained therein, or the resolution or other proceedings on, and prior to, or in the establishment of said drainage ditch designated as "Drainage Ditch No. 1 and 2", on October 3, 1916; and there is no evidence in the record of any extrinsic fraud on behalf of the Board of County Commissioners, or anyone else, in any of said proceedings, and, therefore, the determination of the facts found by said Board in said resolution of October 3, 1916, are now binding and conclusive upon this plaintiff and upon this Court, and this Court has no right, authority, or jurisdiction to enter upon, attempt to decide, to decide or re-litigate such questions of fact as were previously determined by such special Tribunal.

Fourteenth:

Because the undisputed evidence in this case shows that more than five years have elapsed after this plaintiff
171 had actual knowledge and legal notice of the establishment and construction of Drainage Ditch No. 1 and 2, and during all of said time this plaintiff took no steps to question or stop said proceedings, and the expenditure of over Two Hundred and Fifty Thousand Dollars (\$250,000.00) thereon and plaintiff's bill of complaint wholly fails to make any distinct averments, and none of the evidence tends to excuse this unwarranted delay, and for these reasons this Court should not come to its relief.

Fifteenth:

Because the drainage statutes of South Dakota provide a fixed and determinable basis, method and rule of apportionment of benefits, and, pursuant thereto, the Board of County Commissioners of Minnehaha County, South Dakota, applied such fixed and determinable basis, method and rule of apportionment of benefits, which will probably produce approxi-

mately correct general results as to the benefits to plaintiff's property, as well as all other property in the drainage district, and, therefore, such apportionment is not arbitrary, and this Court cannot usurp the power of the Board to equalize the proportion of benefits as provided by
172 said statutes.

Sixteenth:

Because the evidence wholly failed to show that there would result a multiplicity of suits, or irreparable injury, or a cloud cast upon the plaintiff's property, and also failed to show any circumstances to bring the case under some recognized head of equity jurisdiction, and the evidence does show that the plaintiff had a plain, adequate and complete remedy at law.

Seventeenth:

Because all the evidence now shows that there is no jurisdictional amount in controversy in this action, and that, the afore, this action was prematurely brought, in that the apportionment had not been equalized, and no tax had ever been assessed or levied against the plaintiff's property, or any other property, and that the amount of such tax, if any, and, therefore, the amount in controversy herein, has not been, and cannot be, determined until after such equalization and final assessment has been made, as provided by the law of South Dakota, and the uncontradicted evidence shows that said equalization of the apportionment of benefits was prevented by the temporary restraining order and the final decree in this case.

Eighteenth:

The Court erred in not adjudging and decreeing that on October 3, 1916, Drainage Ditch No. 1 and 2 was duly and legally established by the Board of County Commissioners of Minnehaha County, South Dakota, for a public purpose, including but not limited to the drainage of agricultural lands, for the reason, that the Constitution of the State of South Dakota and Section 8458 of the Revised Code of South Dakota, 1919, provide therefor.

Nineteenth:

The Court erred in not adjudging and decreeing that the proceedings taken by the Board of County Commissioners of Minnehaha County, South Dakota, upon the petition of the City of Sioux Falls, F. L. Blackman and others, filed with the County Auditor on August 3, 1916, and upon which Drain-

age Ditch No. 1 and 2 was established on October 3, 1916, constituted the establishment of an entirely new drainage proceeding, and gave the Board of County Commissioners jurisdiction to construct such drainage as a new project, for the reason that such petition prayed for the construction of a drainage ditch over the exact line of drainage ditches

173 previously abandoned, and contemplated a more comprehensive and perfect drainage system for the purpose of draining and benefitting additional property, in compliance with and as authorized by Sections 8458, 8476 and 8489 of the Revised Code of South Dakota, 1919, and the undisputed evidence shows the work done consisted of about eight miles of canalizing the river, doubling the capacity of the ditch and outlet, building dikes, dams and controlling works, and an adequate spillway or outlet to said ditch, at a total cost of over Two Hundred Fifty-five Thousand Dollars (\$255,000.00), which was more than double the amount of the total assessments for old Drainage Ditch No. 1 and Drainage Ditch No. 2, which was the sum of One Hundred Twenty-seven Thousand, Seven Hundred Six and 10/100 Dollars (\$127,706.10).

Twentieth:

The Court erred in not adjudging and decreeing that plaintiff's land was subject to assessment for benefits which it received, if any, under the establishment and construction of Drainage Ditch No. 1 and 2, without regard to whether its lands had been assessed and included within the assessment district of Drainage Ditch No. 1 and Drainage Ditch No. 2, or not, for the reason that Drainage Ditch No. 1 and 2, as established on October 3, 1916, was established as a new project upon due and legal notice to the plaintiff, and in the manner provided by the drainage statutes of South Dakota.

Twenty-First:

The Court erred in entering its decree herein in favor of the plaintiff and against the defendants, upon this plaintiff's bill of complaint and the amendment allowed thereto, for the reason that said plaintiff's offer to amend said bill of complaint came too late, and long after plaintiff's attention was called to the fact that its bill contained no allegation

174 of arbitrary acts by objection to the introduction of testimony during the trial, and after the entire case had been tried, argued and submitted, and briefs had been filed twenty days, which amendment injected an entirely new cause of action into the bill of complaint, and to overcome which, the Court refused to receive evidence showing or tend-

ing to show that plaintiff's property was receiving a substantial benefit, and that the apportionment was not arbitrary and which amendment, when offered, did not conform to the facts established upon said trial, in that said proposed amendment assumed that the Board of County Commissioners were acting under jurisdiction obtained in the establishment of old Drainage Ditch No. 1 and Drainage Ditch No. 2, and not under the new drainage proceedings designated as "Drainage Ditch No. 1 and 2", as shown by the undisputed evidence; assumed that the equalization of the proportion of benefits had been had and assessment duly made thereon, whereas, all the evidence shows that merely a tentative fixing of the proportion of benefits had been made; assumed that the property of plaintiff had not been, and never could be, benefited by old Drainage Ditch No. 1 and Drainage Ditch No. 2 while the uncontradicted evidence shows a substantial benefit from the construction of Drainage Ditch No. 1 and 2; assumed that the assessment for benefits had been made, while the uncontradicted evidence shows that no equalization or assessment of benefits had ever been made, and cannot be made until after the proportion of benefits has been equalized and finally fixed; assumed that the acts of the Board in making the so-called assessment were arbitrary, while the evidence shows that no assessment or equalization of benefit has ever been made; and further, said amendment does not attack the drainage law as arbitrary, or the unit provided by law as arbitrary but al-

leges that the acts of the Board in fixing the amount
175 of the benefits to plaintiff's property were arbitrary, speculative and unjust, whereas, all the evidence shows that the Board, with its Engineer, personally inspected the property affected and exercised its honest judgment as to the benefits received by plaintiff's property, using the fixed and determinable basis, method and rule of apportionment provided by the drainage law of South Dakota, and the undisputed evidence further shows on behalf of both parties that some benefit was received by the plaintiff; assumed the amount of the assessment and made an issue as to the amount of benefit, if any, plaintiff received, which matter this Court has no jurisdiction to determine; assumed and made an issue of the inequality of the so-called assessment upon plaintiff's property, and other agricultural land, which issue is within the exclusive jurisdiction of the State Tribunal, and this Court in this action has no jurisdiction to try or determine the same.

Twenty-second:

The Court erred in not adjudging and decreeing that the plaintiff herein is not in a position to question the regularity of the proceedings in the establishment and construction of Drainage Ditch No. 1 and 2, as an independent drainage proceeding, as it, by its officers and agents, had actual knowledge and legal notice of the proceedings taken to establish said drainage; as it, through its officers and agents, saw the work in the course of construction, assisted in the work of construction thereof, by furnishing services and materials used therein, with knowledge that such services and materials were furnished therefor, and were being used in the construction of said drainage, and received compensation for said services and materials so furnished and used; as it, through its officers and agents, urged and encouraged the Board of County Commissioners to take the action and do the work which was done under such drainage proceedings for its benefit, and as it is now, and has been for more than three years last past, receiving protection and substantial benefits from said drainage construction, with the full knowledge that there was no manner of paying for such construction except by assessment upon the property benefited, included in which was plaintiff's property, all without protest against the doing of any such work, or the extent or manner thereof, until such work and drainage project had been substantially completed, and until this action was brought to restrain the making of an assessment to pay for the cost of said construction, and, therefore, the plaintiff is now estopped from questioning said proceedings and maintaining this action.

Twenty-third:

The judgment and decree herein is not supported by the evidence, and is contrary to law, in that it appears from the undisputed evidence that the outlet to old Drainage Ditch No. 1 was destroyed and abandoned and thereby said ditch abandoned and that the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, fully complied with the requirements of the drainage statutes of South Dakota for the establishment of a new drainage, and that thereafter all the statutory requirements were duly and fully followed and pursued, and such proceedings were had that, pursuant to statute, on October 3, 1916, the Board of County Commissioners of Minnehaha County, upon due notice and hearing of said petition, ordered and adjudged the establishment of said drainage as a new project and drainage ditch, and desig-

nated it as "Drainage Ditch No. 1 and 2", and further adjudged and decreed that the construction thereof was for a public purpose, and was necessary and practicable for draining agricultural lands, and that the property of this plaintiff was included within the drainage area, and affected
177 thereby, which property was described in the petition, notice, and said resolution and judgment, which resolution and judgment was never appealed from by this plaintiff, or anyone, and is now in full force and effect, and has been for more than six years last past; that there is no evidence at all in the record that the plaintiff has been in any manner prevented from fully presenting its defense, if any, to the allegations and prayer contained in said petition of the City of Sioux Falls, F. L. Blackman, et al, or from fully trying all the issues therein presented, or that the jurisdiction of the Board of County Commissioners was imposed upon.

And it further appears from the undisputed evidence that an apportionment of benefits has been made for the payment of the costs of construction of said Drainage Ditch No. 1 and 2, and that the law provides, and the County Commissioners applied, after personal inspection, and exercising their best judgment, a fixed and determinable basis, method, and rule of apportionment of benefits, which will probably produce approximately correct general results as to the plaintiff's property, as well as all other property in the drainage district; and that no equalization of benefits or assessment has been had thereon, and that no legal charge or servitude has yet been placed upon the property of plaintiff, or anyone else, and that this action is premature.

Twenty-fourth:

The said decree is not sustained by the evidence, but is contrary thereto, in that it appears from the undisputed evidence that Drainage Ditch No. 1 and 2 was established as a new ditch by the Board of County Commissioners of Minnehaha County, South Dakota, on October 3, 1916, included in which drainage district was plaintiff's property, and of which proceedings this plaintiff had knowledge and legal notice for
178 more than six years last past, and has never taken any steps prior to the institution of this action, to question or stop said proceedings, and the expenditure of over Two Hundred and Fifty Thousand Dollars (\$250,000.00) thereon, and has wholly failed to establish any lawful excuse for said unwarranted delay; and that all steps taken by the Board of County Commissioners leading up to and the establishment of said Drainage Ditch No. 1 and 2, were war-

ranted in law, and said Board was lawfully acting under and in conformity with the Constitution and drainage statutes of the State of South Dakota; and that said drainage ditch was petitioned for, and lawfully established for a public use and purpose, and for the purpose of draining agricultural lands; that the apportionment of benefits, as made by the Board of County Commissioners, was made pursuant to and in conformity with the method and rule laid down by the drainage statutes of South Dakota, and after a personal inspection and deliberation by said Board, applied in conformity therewith in such a manner as will probably produce approximately correct general results as to the benefits enjoyed by plaintiff's property, as well as all other property in the drainage district and that plaintiff's property is enjoying substantially the amount of benefit apportioned to it.

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Twenty-fifth:

For all the reasons and errors aforesaid, the Court erred in not entering and rendering a decree in favor of the defendants, and against the plaintiff, dismissing its bill of complaint, and denying the injunction herein, and in not entering its judgment and decree in accordance with the prayer of defendants' answers.

Wherefore, defendants pray that the judgment and decree of said Court be reversed, with directions to enter a decree in favor of the defendants and against the plaintiff, dismissing plaintiff's bill, as prayed for in defendants' answers.

ELBERT O. JONES and
L. E. WAGGONER
Solicitors for Defendants.

NORMAN B. BARLETT
Solicitor for Intervening Defendants.

Endorsed: Filed in the District Court on Aug. 25, 1922, at
5 P. M.

180 (Petition for appeal and allowance thereof.)

To The Honorable James D. Elliott, Judge of the
United States District Court Within and for the
Southern Division of the District of South
Dakota:

The above named defendants and intervening defendants feeling themselves aggrieved by the decree made and entered in this case on the 28th day of February A. D. 1922, do hereby

appeal from said decree to the Circuit Court of Appeals, for the Eighth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and they pray that their appeal be allowed, and that citation issue, as
 181 provided by law, and that a transcript of the record, proceedings and papers, upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Eighth Circuit, sitting at St. Paul, Minnesota, and your petitioners further pray that a proper order touching the security to be required of them to perfect their appeal be made.

ELBERT O. JONES and
 L. E. WAGGONER
 NORMAN B. BARTLETT
 Solicitors for Defendants and Intervening Defendants.

The foregoing petition granted, and the appeal allowed upon giving bond, conditioned as required by law, in the sum of One Thousand and No/100 Dollars (\$1,000.00).

JAS. D. ELLIOTT
 Judge of the United States District Court within and for the Southern Division of the District of South Dakota.

Endorsed: Filed in the District Court on Aug. 25, 1922, at 5 P. M.

183 **Bond On Appeal.**

Know All Men By These Presents: That we, A. G. Risty, et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, as Principals, and the Southern Surety Company of Des Moines, Iowa, as surety, acknowledge ourselves to be jointly indebted to the Great Northern Railway Company, appellee in the above cause, in the sum of One Thousand Dollars (\$1,000.00), conditioned that, whereas on the 28th day of February A. D. 1922, in the District Court of the United States, for the Southern Division of the District of South Dakota, in a suit pending in that court wherein the Great Northern Railway
 184 Company was plaintiff, and A. G. Risty, et al, were defendants, and the Minnehaha National Bank of Sioux

Falls, South Dakota, et al, were intervening defendants, numbered on the Equity Docket as 103, a decree was rendered against the said A. G. Risty, et al., defendants, and the said Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, and the said A. G. Risty, et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, having obtained an appeal to the Circuit Court of Appeals for the Eighth Circuit, and filed a copy thereof in the office of the Clerk of the Court to reverse the said decree, and a citation directed to the said Great Northern Railway Company, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals, for the Eighth Circuit, to be held in the City of St. Paul, in the State of Minnesota, on the 2nd day of May, A. D. 1923, next.

Now, if the said A. G. Risty, et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, shall prosecute their appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

A. G. RISTY

Signing for all Defendants.

THE MINNEHAHA NATIONAL
BANK OF SIOUX FALLS,
H. V. Harlon, V. P.

Signing for all Intervening Defendants.

SOUTHERN SURETY
COMPANY OF DES MOINES,
IA.

(Corporate Seal
Southern Surety
Company)

By C. T. Charnock,
Attorney-in-Fact, Surety.

185 State of South Dakota,
County of Minnehaha—ss.

On this 15th day of August, 1922, before me H. B. Charnock, a notary public in and for said County, and State, personally appeared C. T. Charnock, well known to me to be the Attorney-in-fact of the Southern Surety Company, a corporation that is described in and that executed the above and foregoing instrument and duly acknowledged to me that said corporation executed the same.

And I further certify that at the same time the said C. T. Charnock exhibited to me the original certificate of authority

issued to said Company by the Commissioner of the State of South Dakota, and that the following is a true, perfect and complete copy thereof:

**STATE OF SOUTH DAKOTA
DEPARTMENT OF INSURANCE,**

Renewable Office of the Commissioner

Annually. Company's Certificate of Authority.
No. 11050

Whereas, The Southern Surety Company, a corporation organized under the Laws of Iowa, has filed in this Office a sworn statement exhibiting its condition of business for the year ending December 31st, 1921, conformable to the requirements of the Laws of this State regulating the business of Insurance, and

Whereas, The said Company has filed in this office a duly certified copy of its charter, with certificate of organization, and has complied with all the requirements of the Insurance Laws aforesaid;

Now Therefore, I, W. N. Van Camp, Commissioner of Insurance of the State of South Dakota, pursuant to the provisions of said laws do hereby certify that the above 186 named Company is fully empowered through its authorized agents to transact its appropriate business of Accident and Health, Liability, Workmen's Compensation, Fidelity, Surety, Burglary, Theft, Plate Glass and Automobile Insurance in this State according to the Laws thereof, until the last day of February, 1923.

In Testimony Whereof, I have hereunto set my hand and official seal at Pierre, this First Day of March, A. D. 1922.

(Notarial Seal)

W. N. VAN CAMP,
Commissioner of Insurance.
By W. J. Madden,
Deputy Commissioner.

H. B. CHARNOCK,
Notary Public, South Dakota.

The foregoing bond is hereby approved.

JAS. D. ELLIOTT,
Judge of the United States District Court
Within and for the Southern Division of
the District of South Dakota.

Endorsed: Filed in the District Court on Aug. 25, 1922, at
5 P. M.

188 (Praeipie for Transcript.)

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above entitled case for the use of the Circuit Court of Appeals of the United States, for the Eighth Circuit, by including therein the following:

1. The Bill of Complaint, except the title and verification, and except the Exhibits thereto attached.

2. Order Allowing Intervention.

3. The following portions of Defendants' Answer, viz:

(a) Paragraphs "A", "B", "C", "D", and "F" of Defendants' Special Answer.

(b) Introduction and Paragraphs "First" to "Eighteenth" inclusive, of Defendants' General Answer; and

(c) Paragraphs "VIII", "IX", "XII", "XIV" and "XV" of Defendants' Affirmative Defense, together with the prayer.

4. The Statement of the Evidence Submitted, and Approved by the Court.

5. Order to Show Cause for Permission to Amend Bill, and Affidavit supporting the same.

189 6. Return to Order to Show Cause and Affidavit.

7. Order Permitting Amendment of Bill, and Exception-taken to said Order.

8. Amendment to Bill.

9. The Opinion and Decree of the District Court.

10. Assignments of Error:

11. Petition for Appeal.

12. Order Allowing Appeal.

13. Bond upon Appeal, and Approval of same.
14. Notice of Deposit of Statement of Evidence with Clerk and Proof of Service thereof.
15. Approval of Court of the Statement of the Evidence.
16. Citation in Appeal, and Service thereof.
17. Praecipe and Clerk's Certificate.

Dated at Sioux Falls, South Dakota, this 23 day of September, A. D., 1922.

E. O. JONES
N. B. BARTLETT,
Solicitors for Appellants.

Endorsed: Filed in the District Court on Sept. 25, 1922.

191 (Notice to plaintiff of lodgment of statement of evidence in District Clerk's office.)

To H. E. Judge, Solicitor for Great Northern Railway Company, Plaintiff:

Please take notice that the Appellants have prepared a Statement of the evidence to be included in the record upon the appeal of the above entitled matter to the Circuit Court of Appeals, for the Eighth Circuit, and has lodged the same in the office of the Clerk of this Court for your examination, (a copy of which Statement is herewith served upon you).

You will further take notice that the Appellants will ask the Court, at the Government Building, in the City of Sioux Falls, in said District of South Dakota, at ten o'clock in the forenoon of the 3rd day of October, A. D. 1922, or as soon thereafter as counsel can be heard, to approve said Statement.

Dated this 23 day of September, A. D. 1922.

E. O. JONES
N. B. BARTLETT
Solicitors for Appellants.

Service of the foregoing Notice this 23 day of September, A. D. 1922 is hereby acknowledged also service of the Statement therein referred to.

192
Solicitor for Great Northern Railway Company, Plaintiff.

Endorsed: Filed in the District Court on Sept. 25, 1922.

193 (Affidavit of service of notice to plaintiff of lodgment of statement of evidence.)

State of South Dakota,
County of Minnehaha—ss.

N. B. Bartlett, being first duly sworn on oath, deposes and says: That he served the hereto attached notice of lodgment of the statement of the evidence and a statement of such evidence and notice of the time and place set for approval of said statement upon H. E. Judge, Esquire, Solicitor of the above named plaintiff, Great Northern Railway Company, on September 23, 1922, in the city of Sioux Falls, South Dakota, by then and there handing to and leaving with the said H. E. Judge personally, true copies of the hereto attached notice and statement of evidence.

N. B. BARTLETT

Subscribed and sworn to before me this 25 day of September, 1922.

G. J. CLUTTERBUCK

(Notarial Seal)

Notary Public, South Dakota.

194 Endorsed: Filed in the District Court on Sept. 25, 1922.

195 (Additional praecipe for transcript.)

The Clerk of this court is hereby directed to incorporate into the transcript upon appeal in the above entitled cause, for the use of the Circuit Court of Appeals to the United States for the Eighth Circuit, the following additional portions of the record, which are not indicated in the praecipe filed by appellants, to-wit:

1. The title of the case as a part of and as it appears in the bill of complaint and Exhibit B and Exhibit C attached to and made a part of the bill of complaint.

2. The title of the case as a part of and as it appears in the defendant's answer.

3. Paragraph I, VII and XIII of defendants' affirmative defense, as a part of defendants' answer.

4. The following exhibits made a part of the answer,
196 to-wit: The petition of F. L. Blackman, and others, upon which the proceedings with reference to Drainage Ditch No. 1 and 2 are alleged to have been had; the order for filing said petition; the resolution for sur-

vey under said petition; the resolution fixing line and width of the ditch and time and place for hearing the petition of F. L. Blackman, and others; the published notice of hearing said petition, (said notice not being attached to the answer but having been filed after the filing of the answer and on November 28th, 1921 together with a stipulation that it might be considered as a part of the answer); and the resolution establishing Drainage Ditch No. 1 and 2, all of said exhibits to be inserted as a part of said answer.

H. E. JUDGE
Solicitor for Appellee.

Endorsed: Filed in the District Court on Oct. 24, 1922, at 4 P. M.

198 (Statement of Evidence.)

(Filed in U. S. District Court on January 10, 1923.)

The above entitled suit came on for hearing before the Court on December 15th, 1921, before the Honorable J. D. Elliott, Presiding Judge, plaintiff appearing by Mr. H. E. Judge, its solicitor, defendants appearing by Mr. E. O. Jones, their solicitor, and the intervening defendants appearing by Messrs. Porter & Bartlett, their Solicitors, the following proceedings were had:

199 Evidence of Plaintiff.

F. E. WARD, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Stipulation.

"It is stipulated and agreed between all parties that the testimony received in these consolidated cases shall be considered as received in each case, so far as such testimony is pertinent to such case, and that such testimony apply only to that case."

Q. You may state your name?

The defendants now move the Court that plaintiff's bills of complaint herein be dismissed and the restraining order set aside, for the reasons that the said bills of complaint fail to state any matter of equity entitling the plaintiffs to the relief prayed for, nor are the facts stated therein sufficient to entitle plaintiffs to any relief against these defendants.

For the further reason that this court has no jurisdiction over these matters, because plaintiffs' bills of complaint herein do not set forth any matter of equity in addition to the pretended constitutional question, said complaints not setting forth facts sufficient from which this court can infer or presume that there will result a multiplicity of suits, irreparable injury or a cloud cast upon the title of their property, or any special circumstances to bring the cases under some recognized head of equity jurisdiction, it affirmatively appearing that the plaintiffs have a plain, adequate and complete remedy at law.

200 For the further reason that it affirmatively appears from the fact of the bills of complaint and record, that there is no jurisdictional amount in controversy at this time and these actions are premature and that no assessment or tax has in fact been equalized, assessed or levied, and that the state tribunal having jurisdiction thereof was enjoined by these proceedings before it had opportunity to perform its statutory duties, equalize or determine or fix the amounts of benefits, assessment or tax chargeable against the property of the plaintiffs, if any, and if the plaintiffs will establish that they received no benefits by reason of the ditch in controversy, as alleged in said bills, before the state tribunal appointed by law to equalize the apportionments of benefits, then no assessment or tax against their property will be made, and they can suffer no irreparable injury, multiplicity of suits, nor will any cloud be cast upon the title to their property.

For the further reason that the findings and determinations of the state tribunal upon questions of fact before them, are conclusive upon this court in this action, this court having no original jurisdiction by a bill in equity to reject or control the proceedings of that tribunal, the same being the Board of County Commissioners of Minnehaha County, South Dakota, in these ditch proceedings. Motion denied, defendants and intervening defendants excepting.

201 The defendants and intervening defendants then objected to the introduction of any testimony for the reason and on the ground urged in the motions to dismiss. Objection overruled. The Defendants and intervening defendants excepting.

(Testimony of Witness F. E. Ward)

I am the auditor of Minnehaha County, South Dakota; drainage ditch records A and B and Commissioners records 5 and 6 are part of the records of Minnehaha County, and of

the drainage proceedings of the Board of County Commissioners of Minnehaha County.

Plaintiff offered and there were received in evidence the following portions of Drainage Ditch Record A.

July 1, 1907.

Petition for Drainage.

To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

Your petitioner respectfully represents: That he is a resident of the City of Sioux Falls in said County; that he is the owner of certain lands in the valley of the Big Sioux River north and west of the City of Sioux Falls in said County, viz: Blocks Three (3) and Thirty-one (31) of Meredith's First Addition to Sioux Falls, according to the recorded plat thereof; the Northwest Quarter of the South West Quarter of Section Eighteen (18), and the South West Quarter of the North West Quarter of said Section Eighteen (18), except the railroad right of way, all in Township One Hundred and One (101 North, of Range Forty Nine (49); also a certain 202 tract or parcel of land bounded and described as follows, to-wit:—Commencing at a point twenty-four (24) rods north of the southeast corner of the North-West quarter of Section Thirty Two (32), in Township One Hundred and Two (102) North, of Range Forty-Nine (49); running thence north ten (10) rods; thence west eighty (80) rods; thence south ten (10) rods; thence east eighty (80) rods to the place of beginning all of which lands will be affected by the drainage herein proposed;

Your petitioner further represents that it is necessary for the drainage of agricultural lands in said Big Sioux Valley between the dam of the Cascade Milling Company in the City of Sioux Falls and the City of Dell Rapids that the proposed drainage be established.

Your petitioner further represents that the establishment of such drainage will be conducive to the public health, convenience and welfare of the inhabitants of the City of Sioux Falls and of the inhabitants of the Big Sioux Valley between Sioux Falls and Dell Rapids that the establishment of such drainage will prevent the frequent loss of many thousands of acres of crops and meadow in said valley and will prevent great damage to the buildings and their contents; and will prevent great damage to the highways in said County, and also to the railroad tracks and rights of way of the Chicago, Mil-

waukee & St. Paul Railway Company and of the South Dakota Central Railway Company in said valley; and will prevent damage and destruction of many bridges and their approaches in said valley;

Your petitioner further represents that the general purpose of said proposed drainage is, among other things, to
 203 prevent the annual or occasional flooding of lands in said valley caused by high water in said river, by providing a drain to carry off all the water of said river above its normal stage or above the point where it overflows its banks; that such drainage can be accomplished by establishing a drain from an initial point near the place where said river crosses the center line of Section Five (5) in Township One Hundred and One (101) North of Range Forty Nine (49), and running thence southeasterly across said Section Five (5), Section Four (4) and the North Half of Section Nine (9), all in Township One Hundred and One (101) North of Range Forty Nine (49) and east of the buildings of the State Penitentiary to a terminal point on said river in the City of Sioux Falls near the center of Section Nine (9) in said Township, the length of which will be approximately one and three-fourths miles.

Your petitioner further represents that the territory likely to be affected thereby is that portion of the Townships of Dell Rapids, Sverdrup, Mapleton, Wayne and Sioux Falls and of the City of Sioux Falls in the immediate valley of the Big Sioux River subject to overflow from said river.

Dated July 1, 1907.

WILLIAM H. LYON

Petitioner.

204 State of South Dakota,
 County of Minnehaha—ss.

Personally appeared William H. Lyon, who being first duly sworn, deposes and says; that he is the petitioner in the above entitled matter; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

WILLIAM H. LYON

Subscribed and sworn to before me, this 1st., day of July, 1907.

(Notarial Seal) M. E. McDOUGAL,
Notary Public.

Petition for Drainage, Filed this 1st day of July, 1907.

C. E. HILL, County Auditor.
By H. W. Ward, Deputy.

Plaintiff offered and there was received in evidence pages 562 and 563 and the first two lines of 564 of Commissioners' Record 5, it being a resolution of the Board of County Commissioners fixing the route and width of the proposed ditch and the time and place of hearing the petition of W. H. Lyon for the proposed drainage ditch thereafter established as Drainage Ditch No. 1.

This resolution is not printed at length herein because it contains matter not deemed of importance. It established the line of Drainage Ditch No. 1 as follows: Commencing 58 feet west and 135 feet north of the southeast corner of Section 29, Township 102, Range 49, thence south parallel to the adjacent highway 2085 feet to station No. 114; also commencing 674 feet north and about 35 degrees west of Station No. 114; thence southeasterly 674 feet to said Station 114, thence south and parallel to said highway 7700 feet to Station No. 37, thence south 45 degrees, east 3700 feet to Station Zero (0), thence south 59 degrees, 36', east to the Big Sioux River.

It also contains the following provisions: "Be it resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the width of said drainage ditch be and it is hereby fixed at 40 feet at the bottom thereof, with a side slope of one foot to one."

Plaintiff offered and there was received in evidence the following part of Commissioners Record 5:—

Sioux Falls, S. D., Dec. 31, 1907.

Pursuant to adjournment, at 10 o'clock A. M. Tuesday, December 31, 1907, the Board of County Commissioners met in their room at the County Court House.

Present:

Dist. No. 5: Thomas McKinnon, Chairman.

Dist. No. 1: Charles Harvey.

Dist. No. 2: John E. Johnson.

Dist. No. 3: Alfred Acheson.

Dist. No. 4: J. D. Howard.

C. E. Hill, County Auditor, Clerk.

Mr. J. H. Gates, attorney for the Board in the matter of Drainage Ditch No. 1, filed and read a written opinion in regard to the legal propositions presented.

Further remarks were made by Messrs. Porter, Keith and Bates and by Mr. Blackman.

On motion, the Board adjourned at 2 o'clock P. M. Tuesday, December, 31, 1907.

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Sioux Falls, S. D., Dec. 31, 1907.

Pursuant to adjournment, at 2 o'clock P. M. Tuesday, December 31, 1907, the Board of County Commissioners met in their room at the county court house.

Present:

Dist. No. 5: Thomas McKinnon, Chairman.

Dist. No. 1: Charles Harvey.

Dist. No. 2: John E. Johnson,

Dist. No. 3: Alfred Acheson.

Dist. No. 4: J. D. Howard.

C. E. Hill, County Auditor, Clerk.

Mr. Howard offered the following resolution:

Resolution Establishing Drainage Ditch No. 1:

The matter of the petition of William H. Lyon for the establishment of a drainage ditch filed in the County Auditor's office of Minnehaha County, South Dakota, on July 1, 1907, the said drainage ditch having been heretofore described and named "Drainage Ditch No. 1", coming on to be heard by the Board of County Commissioners at a regularly adjourned meeting, on Monday, December 30, 1907, pursuant to notice heretofore given, and written objections thereto having been filed by Martin Oien, et al, and by Joseph C. Carpenter, and by the Chicago, Milwaukee and St. Paul Railway Co. and the claims of said parties having been presented orally by their

counsel, and William H. Lyon, F. S. Blackman, O. Benson and others having appeared in behalf of said petition, and said hearing having been adjourned to this 31st, day of December, 1907, and this Board having fully heard and considered said petition and all matters in opposition to and in support of the same; Now Therefore

207 Be it Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that said Drainage Ditch No. 1, is conducive to the public health, convenience and welfare, and is necessary and practicable for draining agricultural lands, and it is so found:

Be it further Resolved that said Drainage Ditch No. 1, be and is hereby established:

Be It Further Resolved that this Board proceed to assess the damages sustained by each tract of land, or other property through which the same shall pass, and damages as compensation for the land taken for the route of such drainage.

Mr. Howard moved the adoption of said resolution, and that the vote be taken by districts. Mr. Harvey seconded the motion. Upon roll call,

Charles Harvey, Dist. No. 1 voted, Yes;

J. E. Johnson, Dist. No. 2 voted, No;

Alfred Acheson, Dist. No. 1 voted, No;

J. D. Howard, Dist. No. 4. voted, Yes;

Thomas McKinnon, Dist. 5 voted, Yes;

The Chairman declared the resolution adopted.

Plaintiff offered and there was received in evidence the following portions of Ditch Record A;

April 11, 1908.

Resolution Assessing Benefits.

Whereas, The Board of County Commissioners of Minnehaha County, South Dakota, has established Drainage Ditch No. 1, and has fixed the damages arising therefrom, and has been
208 investigating and considering the proportion of benefits that will accrue to the lands, tracts and lots within the drainage area of said Drainage Ditch; and

Whereas, in arriving at this determination of the proportion of benefits it has considered, not only the benefits which

will accrue directly by virtue of the construction of said Drainage Ditch, but also the indirect benefits by virtue of said drainage being an outlet for connecting drains that may hereafter be constructed, and particularly is this so in reference to the lands within the drainage area lying north of a line running east and west through the center of Section Twenty Nine (29) Mapleton Township; and

Whereas, the number of acres set opposite each tract hereinafter described represents the actual number of acres of land within said tract that are benefitted, and excluding therefrom lands taken by said Drainage Ditch, and excluding also lands embraced within laid out highways, and in fixing the proportion of benefits to platted lots along said Drainage Ditch, the land taken by the drainage is excluded; and

Whereas, in the use of the word "tract" in said list of descriptions reference is had to the tract as it appears upon the plat of the County Auditor's Subdivision of the particular quarter section in which the land is located on file in the Register of Deeds office; and

Whereas, in the consideration of benefits said Board has assumed that the North-East Quarter of the North-East Quarter of the South-West Quarter of Section Thirty-Three (33) in Township One Hundred and Two (102) of Range

Forty-Nine (49) West of the Fifth P. M., owned by the 209 state of South Dakota, and containing ten acres is benefitted "one", and taking the same as a unit;

Therefore, Be it Resolved that the benefits to the following described lands, tracts and lots; the benefits to the City of Sioux Falls; the benefits to the Townships of Sverdrup, Mapleton, Sioux Falls and Wayne; the benefits to the County of Minnehaha; and the benefits to the several Railroad Companies hereinafter described, arising and accruing by the construction of Drainage Ditch No. 1, be, and they are hereby fixed and determined in the following proportions, viz:—

(Here follows descriptions of lands in Sections 31, 32, 33, 29, 28, 21, 20, 19, 17, 16, 9, 8, 5, 4, and 3, Township 102, Range 49, Sections 34, 33, 32, 29, 28 and 27 in Township 103, Range 49; and Sections 4, 5, 6, 7, 8, 9, 17, 18, 19, 30, and 31, in Township 101, Range 49; and Sections 13, 24, and 25 in Township 101, Range 50; and of lots and blocks in the following additions to Sioux Falls, to-wit: Berwick; Brookings, Brooks; Bunkers; Minnehaha Trust Company Subdivision of Block 3 of Carpenter's Addition; Carpenters; Central Park; Englewood; Harrison; Lake View; Lincoln Park; McClellan

Second; Meredith's First; Meredith's Second; Millard Park; North Boulevard; North Park; North Park Second; Sioux Falls Improvement Company; Summit; West Lawn; West Park, and of certain lots in the Town of Renner, with the names of the owners and the proportion of benefits assessed to each; the Northern States Power Company, the Sioux Falls Light & Power Company, The Great Northern Railway Company, and the Chicago, Rock Island & Pacific Railway Company are not named or mentioned, and no property now or ever owned by any of them is described or referred to. A large amount of property situated in a southerly direction from the ditch and its outlet, commonly called "the spillway," and now attempted to be assessed under the proceedings [initiated] by the filing of the petition of F. L. Blackman, and others, attached to and made a part of the answer herein, and which property is described in the "Drainage Ditch Notice" attached to and made a part of the bill of complaint herein is likewise not described in this exhibit. Following the description of lands, lots, and blocks above referred to and omitted here for the purpose of diminishing the record, are the descriptions of railroad and certain other properties, and the conclusion of the exhibit, which are as follows:

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Name of Owner.	Description	Acres.	Proportion of Benefits
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 28, 29, and 33, township 103, range 49, west 5th p. m.	25.02	3.75
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 4, 9, 16, 21, 28 and 33, township 102, range 49, west 5th p. m. Sioux Falls and Egan line....	72.50	15.41
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 5, 8, and 9, township 102, range 49 west 5th p. m. (Sioux Falls and Madison line)	17.30	2.60
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 4 and 6, township 101, range 49, west 5th p. m.	17.05	5.12
South Dakota Central Railway Co.	Right of way as now laid out and located across sections 29 and 32, township 102, range 49 west 5th p. m.	11.06	3.32

South Dakota Central Rail- way Co.	Right of way as now laid out and located across sections 4, 5, and 9, township 101, range 49, west 5th p. m.	17.72	5.32
Chicago, St. Paul, Minneapolis & Omaha Railroad Co.	Right of way as now laid out and located across section 18, Township 101, range 49, west of 5th p. m.	12.18	3.65
Chicago, St. Paul, Minneapolis & Omaha Railroad Co.	Right of way as now laid out and located across section 13, Township 101, range 50, West 5th p. m.	16.88	5.06
Sverdrup Town- ship.	Seven miles and 84 rods of laid out and established high- ways within the drainage area.		2.9
Mapleton Township.	Twelve miles and 52 rods of laid out and established high- ways within the drainage area.		7.73

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Sioux Falls Township.	Two and onehalf miles of laid out and established highways within the drainage area.....		3.2
Name of Owner	Description	Acres	Proportion of Benefits
Wayne Township	Three quarters of a mile of laid out and established high- ways within the drainage area.		.6
City of Sioux Falls	1½ miles of highways and dedicated streets within the drainage area9
Minnehaha County	Benefits arising from the safe- ty to and preservation of bridges within the drainage area		25.

Be It Further Resolved that Tuesday, the 5th day of May, 1908, at two o'clock P. M. at the office of the County Auditor of said County be and it is hereby fixed as the time and place for the equalization of such proportion of benefits, and that notice thereof be given, in accordance with the provisions of Sec. 6. of Chap. 134 of the Laws of 1907 of the State of South Dakota, the same to be signed by the Chairman of this Board and attested by the County Auditor, by publication in the Sioux Falls Weekly Argus-Leader, once in each week for two consecutive weekly issues, and one further publication in the Sioux Falls Daily Argus Leader, and by posting copies of such notice in at least three public places near the route of said Drainage Ditch, the said posting and the last of such

publications to be made at least 10 days prior to the time of said hearing.

Adopted April 11, 1908

THOS. McKINNON,
Chairman.

Attested:

C. E. Hill,
County Auditor.
(Seal)

213 Filed in the office of the Auditor of Minnehaha County,
S. D. this 8th day of April, 1908.

C. E. HILL
County Auditor.

Plaintiff offered in evidence pages 53 to 61 inclusive of Ditch Record A, being the record of notice of hearing upon the equalization of benefits with reference to Ditch No. 1. In this notice of hearing the same persons are named and the same property is described as in the "resolution assessing benefits".

Plaintiff offered in evidence pages 260 to 268, inclusive, of Ditch Record A, the same being a record of the levying of the assessment for Drainage Ditch No. 1. In this assessment the same persons and the same property was assessed as is described in the "resolution assessing benefits." This record shows that the commissioners ascertained and determined the entire cost of Drainage Ditch No. 1 to be the sum of \$46,600.10.

214 Plaintiff offered in evidence pages 94 to 95 and a portion of page 96 of Ditch Record A, as follows:

April 10, 1908.

Petition for Drainage.

To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

Your petitioners respectfully represent that they are all residents of the Township of Mapleton in said County, and that each of them is the owner of certain lands in said Township in the valley of the Big Sioux River as follows: The said Iver R. Peterson is the owner of the South Half of the South West Quarter of the North East Quarter of Section

Seventeen (17) and the South Half of the East Thirteen (13) acres of the South East Quarter of the North West Quarter of Section Seventeen (17); that the said Bernt Mekvold is the owner of the South-West Quarter of the North West

Quarter of Section Seventeen (17) and the West Twen-
215 ty-six and Two-Thirds ($26 \frac{2}{3}$) acres of the South

East Quarter of the North West Quarter of Section Seventeen (17); that the said William O. Quincy is the owner of the West Half of the North West Quarter of Section Twenty (20); and that the said Iver I. Nelson is the owner of the East Half of the South West Quarter of Section Seventeen (17) and the North West Quarter of the South West Quarter of Section Seventeen (17), all in Mapleton Township, Minnehaha County, South Dakota, all of which lands will be affected by the drainage herein proposed;

Your petitioners further represent that it is necessary for the drainage of agricultural lands in said Big Sioux Valley from a point about four miles north of the south line of Sverdrup Township to a point about one and one-half miles north of the south line of Mapleton Township, that the proposed drainage be established;

Your petitioners further represent that the establishment of such drain will be conducive to the general health, convenience and welfare of the inhabitants of said territory, and that the establishment of such drainage will prevent the frequent loss of many thousands of acres of crops and meadow in said valley, and will prevent great damage to the buildings and their contents, and will prevent great damage to the highways in said territory, and also to the railroad tracks and the rights of way of the Chicago, Milwaukee and St. Paul Railway Company in said territory, and will prevent damage and destruction of many bridges and their approaches in said territory;

216 Your petitioners further represent that the general purpose of said proposed drainage is, among other things, to prevent the annual or occasional flooding of land in said territory caused by high water in said river by providing a drain to carry off all of the water of said river above its normal stage from about the point where it overflows its banks; that such drainage can be accomplished by establishing a drain from an initial point near the place where said river crosses the south line of Section Five (5) of Mapleton Township, and running thence southeasterly adjacent to the right of way of the Madison line of the Chicago, Milwaukee and St. Paul Railway Company to the west line of

the East Half of the North East Quarter of Section Eight (8) in Mapleton Township, running thence south about three miles to a point about forty (40) rods south of the north line of Section Twenty Nine (29) in Mapleton Township where the said line intersects Silver Creek, running thence southeasterly to the upper end of Drainage Ditch No. 1, as established by said Board;

Your petitioners further represent that, as a part of said plan of drainage, there should be constructed a dike along the south and southeasterly side of said Big Sioux River where the same flows through the North East Quarter of Section Thirty-two (32) in Sverdrup Township, such dike to be of the length of thirty (30) or forty (40) rods.

Your petitioners further represent that the territory likely to be affected thereby embraces Sections Sixteen (16), Seventeen (17), Eighteen (18), Twenty (20), Twenty-one (21), Twenty seven (27), Twenty Eight (28), Twenty Nine (29), Thirty-Two (32), Thirty Three (33) and Thirty Four (34) in Sverdrup Township, and Sections Three (3), Four (4) Five (5), Eight (8), Nine (9), Sixteen (16), Seventeen (17), Nineteen (19), Twenty (20), Twenty One (21), Twenty Eight (28), and Twenty Nine (29) in Mapleton Township.

Dated April 9, 1908

IVER R. PETERSON
IVER I. NELSON
BERNT MEKVOLD
W. O. QUINCY

Petitioners.

Filed in the office of the Auditor of Minnehaha County, S. D., this 10th day of April, 1908.

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C. E. HILL

County Auditor

Plaintiff offered in evidence page 113 of Ditch Record A, as follows:

January 8, 1909.

Further Petition.

To the Honorable Board of County Commissioners, of Minnehaha County, South Dakota:

The undersigned land owners in the valley north of Sioux Falls respectfully request, pursuant to the trip of inspection

made by you on December 15, 1908, that in acting upon the petition of Iver R. Peterson and others for a drainage ditch in Mapleton Township you will cause the proposed drainage ditch to be extended further north and made a part of Ditch No. 1, also that as a part of said proposed drainage system, you will cause a ditch to be established on the west side of the Big Sioux River from a point above the Baltic dam southerly to a suitable place on the river in Section Eighteen (18) in Sverdrup Township, and that you will by a proper outlet on the east side of the river, provide for the taking care of the surplus water so dumped into the river at that point.

A. L. Berg
Ole J. Ustrud
G. T. Gunderson
O. G. Brende
John Aasen
P. M. Thompson
Ole O. Langness
H. G. Solem
T. A. Berven

Oluf Lyng
Mrs. Mary Lee
Mrs. Anne Larson by Agt.
K. Larson
J. H. Williamson
E. O. Fossum
John P. Risvold
Gunerius Thompson

Filed in the office of the Auditor of Minnehaha County,
218 S. D., this 8th day of January 1909.

C. E. HILL, County Auditor.

Plaintiff offered in evidence pages 121 to 123, inclusive, of Ditch Record A, as follows:

Resolution for Adjourned Hearing:

(Transcribed from Commissioners Record No. 6, Page 170-1-2-3)

On motion the following resolution was unanimously adopted:

Resolution:

Whereas, on April 10, 1908, Iver R. Peterson and others filed their petition with the County Auditor of Minnehaha County, South Dakota, for the establishment and construction of a certain drainage ditch in Mapleton Township in said County; and

Whereas, this Board did on June 12, 1908, adopt a resolution for the survey thereof; and

Whereas, Mr. S. Howe, County Surveyor, employed by this Board for making such survey, did on November 13, 1908, file his report thereof, together with maps and profiles, and

Whereas, this Board did on said last named date fix Friday, December 4, 1908, at the office of the County Auditor of said County as the time and place for the hearing of said petition, and did cause notice of said hearing to be given publication and posting, as required by law; and

219 Whereas, December 4, 1908, a petition was presented by A. L. Berg, and others for the extension of said ditch; and

Whereas, said matter has by successive adjournments been continued until April 9, 1909; and

Whereas, said engineer did on April 8, 1909, present his supplemental report of survey and plans and profiles; and

Whereas, this Board has inspected the route of said drainage ditch as described in said petition and as hereinafter described; and

Whereas, this Board deems it practicable, necessary and best that the route of said drainage ditch be varied from the route described in said petition and its northerly terminal points be materially changed; therefore

Be it Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the line of said drainage ditch be and it is hereby changed from the route described in said petition to run as follows: the same being substantially as petitioned for up to the point where the same crosses the Madison branch of the Chicago, Milwaukee and St. Paul Railway Company, viz:

First Section.

Commencing at a point ten hundred forty-five (1045) feet north and fifty-eight (58) feet west of the Southeast corner of Section twenty-nine (29) in Township One Hundred and Two (102) North, Range Forty-nine (49); running thence north five hundred forty seven (547) feet; thence north 23 west thirty three hundred eighteen (3318) feet to a point fifty eight (58) feet west of the quarter quarter line in the North East Quarter (NE $\frac{1}{4}$) of Section Twenty Nine (29). in said Township; thence north parallel with, and fifty-eight (58) feet west of said quarter quarter line through Section

220 Twenty Nine (29), Twenty (20), Seventeen (17), and a part of Section Eight (8) Twelve thousand nine hundred thirty five (12935) feet; thence north 50 East twenty seven hundred thirty two (2732) feet to a point thirty

three (33) feet west of the west line of the right of way of the Chicago, Milwaukee and St. Paul Railway Company in the North West Quarter of Section Nine (9) in said Township; thence northerly parallel with and thirty three (33) feet west of the said right of way line nineteen thousand three hundred, sixty eight [(19386)] feet to a connection with a high water channel of the Big Sioux River in the South East Quarter of Section Twenty (20) in Township One Hundred and Three (103) North, Range Forty Nine (49).

Second Section:

Commencing at a point sixteen hundred and forty (1640) feet east of the center of Section Eighteen (18) in Township One Hundred and Three (103) North, Range Forty Nine (49); running thence north 33 west thirty one hundred and fifty five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8) in said Township; thence north parallel with and sixty (60) feet west of the quarter line of Section Seven (7) and Six (6) in said Township, and in Section Thirty One (31) in Township One Hundred and Four (104) North, Range Forty Nine (49) to the center line running East and West through said Section Thirty One (31); thence northeasterly to the creek near the northeast corner of said Section Thirty One (31), the said line being the center line of said proposed drainage ditch; that the width of said drainage ditch be and it is hereby fixed at forty (40) feet at the bottom thereof with a side slope of one and one-half feet to one; and that the fall of said proposed drainage ditch be three (3) feet per mile from
221 north to south, and that the area required for right of way and dump space will be four (4) rods on each side of said line, except where it is adjacent to the right of way of the Chicago, Milwaukee and St. Paul Railway Company, and that the area required for right of way and dump space where said proposed line runs adjacent to the right of way of said Railway Company shall be two (2) rods on the easterly side of said line and six (6) rods on the westerly side of said line;

That in addition thereto the Big Sioux River be straightened in Section Seventeen (17), Eighteen (18) and Twenty (20) in Township One Hundred Three (103) North, Range Forty Nine (49) in order to afford better means of communication between the lower end of Section Two (2) of said ditch and the upper end of Section One thereof;

Be It Further Resolved that this hearing be and it is hereby adjourned until Thursday May 6, 1909, at two o'clock P. M. at the office of the County Auditor of said County, and that no-

tice thereof be given in accordance with the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by the Laws of 1909, the same to be signed by the Chairman of this Board and attested by the County Auditor by publishing the same once in each week for two consecutive weeks in the Sioux Falls Daily Argus-Leader, and by posting copies of said notice in at least three public places near the route of said proposed drainage ditch as varied and extended, such posting to be made at least two weeks prior to the time of said hearing.

Adopted April 9, 1909.

THE BOARD OF COUNTY
COMMISSIONERS MINNEHAHA
COUNTY, SOUTH DAKOTA.
By Thos. McKinnon, Chairman.

222 Plaintiff offered and there were received in evidence pages 135 to 136 of Ditch Record A, as follows:

Resolution Establishing Drainage Ditch No. 2:

The matter of the petition of Iver R. Peterson and others for the establishment of a drainage ditch, filed in the office of the County Auditor of Minnehaha County, South Dakota, on April 10, 1908, coming on to be heard by the Board of County Commissioners of said County at a regularly adjourned meeting on Thursday May 6, 1909, pursuant to notice heretofore given, and said Board having heard and considered said petition and all matters in support of the same and in opposition thereto; Now therefore

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the said drainage ditch as extended and varied and as described and set forth in the resolution adopted by this Board on April 9, 1909, is conducive to the public health, convenience and welfare and is necessary and practicable for draining agricultural lands, and it is so found;

Be it Further Resolved that the said drainage ditch as described and set forth in the said resolution of April 9, 1909, be and it is hereby named and designated "Drainage Ditch No. 2";

Be it Further Resolved that the said Drainage Ditch No. 2 be and the same is hereby established;

Be it Further Resolved that in the construction of said drainage ditch the rights of flowage of Wm. G. Milne, the owner of the mill at or near Baltic, S. D., will not in any way be diminished or interfered with and the engineer is hereby directed to so establish the level of the bottom of said drainage ditch, where the same joins with the creek near the north-east corner of Section Thirty One (31) in Dell Rapids Township that it will not diminish or interfere with such rights of flowage and that a head gate or other protection will be
 223 established if necessary, to prevent the waters of the Big Sioux River from flowing into said ditch at a point lower than the maximum height of such rights of flowage;

Be it Further Resolved that this Board proceed to assess the damages sustained by each tract of land or other property through which the same shall pass and damages as compensation for the land taken for the route of such drainage and that the same be made a special order for Friday May 7, 1909, at nine o'clock A. M.,

On motion, the Board adjourned to May 7, 1909 at 9 o'clock A. M.

Plaintiff offered and there were received in evidence pages 48 to 60 inclusive of Ditch Record B, as follows:

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October 7, 1910.

The Board having had under consideration for several days the matter of the preliminary Assessment of Proportion of Benefits which was being prepared by J. H. Gates, Attorney with the assistance of Engineer Wagner and the same being completed, on motion the following resolution was adopted:

**Resolution Fixing Proportion of Benefits
Drainage Ditch No. 2.**

Whereas the Board of County Commissioners of Minnehaha County, South Dakota, has established the Drainage Ditch No. 2, and has fixed the damages arising therefrom and has been investigating and considering the proportion of benefits that will accrue to the lands, tracts and lots within the drainage area of said drainage ditch; and

Whereas in arriving at this determination of the proportion of benefits it has considered not only the benefits which will accrue directly by virtue of the construction of said drainage ditch, but also the indirect benefits by virtue of such drainage being an outlet for connecting drains that may hereafter be constructed; and

Whereas said Board is of the opinion that the drainage area of Drainage Ditch No. 1 is benefitted by the establishment and construction of Drainage Ditch No. 2, and that both of said drainage ditches are mutually interdependent, and should virtually be considered as one drainage system; and

Whereas in the determination of the proportion of benefits herein fixed and determined upon the several premises embraced within the drainage area of Drainage Ditch No. 1 the proportion of benefits as finally fixed and equalized in the matter of said Drainage Ditch No. 1 have been taken into consideration; and

225 Whereas the number of acres set opposite each tract hereinafter described represent the actual number of acres of land within said tract that are benefitted, and excluding therefrom land taken by said drainage ditch, and excluding also lands embraced within laid out highways, and in fixing the proportion of benefits to platted lots along said drainage ditch the area therefor taken by the drainage is excluded; and

Whereas in the use of the word "tract" in said list of descriptions reference is had to the tract as it appears upon the plat in the County Auditor's Subdivision of the particular quarter section in which the land is located, on file in the Register of Deeds' office of said County, and in the description of lands herein by reference to books and pages of deed records such references are to the deed records in the office of said Register of Deeds; and

Whereas, in the consideration of such proportion of benefits said board has assumed that the Southeast Quarter of the Northeast Quarter of the Northeast Quarter of Section Twenty, in Township One Hundred Three North, Range Forty-nine, West Fifth P. M., owned by Martha R. Roberts, and containing ten acres, be benefitted "One", and taking said tract as a unit;

Therefore, Be it Resolved that the benefits to the following described lands, tracts and lots; the benefits to the City of Sioux Falls; the benefits to the Townships of Sioux Falls, Wayne, Mapleton, Sverdrup and Dell Rapids; the benefits to the County of Minnehaha; and the benefits to the several railroad companies hereinafter described, arising and accruing by the establishment and construction of Drainage Ditch No. 2, be, and they are hereby fixed and determined in the following proportions, viz:

226 (Here follows descriptions of lands in Sections 4, 5, 6, 7, 8, 9, 17, 18, 19, 30, and 31, in Township 101, Range 49; Sections 13, 24 and 25, in Township 101, Range 50; Sections 3, 4, 5, 8, 9, 16, 17, 19, 20, 21, 28, 29, 31, 32, and 33, in Township 102, Range 49; Sections 5, 6, 7, 8, 9, 16, 17, 18, 20, 21, 27, 28, 29, 32, 33, and 34, in Township 103, Range 49; Sections 29, 31, and 32, Township 104, Range 49; and of certain lots in the town of Renner; and of lots and blocks in the following additions to Sioux Falls, to-wit: Berwick; Brookings; Brooks; Bunkers; Central Park; Englewood; Harrison; Lakeview; Lincoln Park; McClellan's Second; Meredith's First; Meredith's Second; Millard Park; North Boulevard; North Park; North Park Second; Sioux Falls Improvement Co.; Summit; West Lawn; and West Park, with the names of the owners and the proportion of benefits assessed to each. The Northern States Power Company, the Sioux Falls Light & Power Company, the Great Northern Railway Company, and the Chicago, Rock Island & Pacific Railway Company are not named or mentioned, and no property now or ever owned by any of them is described or referred to. A large amount of property situated in a southerly direction from the ditch and its outlet, commonly called "the spillway," and now attempted to be assessed under the proceedings initiated by the filing of the petition of F. L. Blackman, and others, attached to and made a part of the answer herein, and which property is described in the "Drainage Ditch Notice" attached to and made a part of the bill of complaint herein is likewise not described in this exhibit. Following the description of lands, lots and blocks above referred to and omitted here for the purpose of diminishing the record, are the descriptions of railroad and certain other properties, and the conclusion of the exhibit, which are as follows:

227

Name	Description	Acres	Proportion of Benefits.
City of Sioux Falls	One and one eighth miles of highways and dedicated streets within the drainage area.....		.090
Sioux Falls Township	Two and one-half miles of laid out and established highways within the drainage area320
Wayne Town- ship	Three quarters of a mile of laid out and established highways within the drainage area060
Mapleton Township	Twelve miles and 52 rods of laid out and established highways within the drainage area		8.725

Sverdrup Township	Fifteen and seven-eighths miles of laid out and established highways within the drainage area	17.710
Dell Rapids Township	One and three-eighths miles of laid out and established highways within the drainage area	1.936
Minnehaha County	Benefits arising from the safety to and preservation of bridges within the drainage area	9.100
Chicago, St. Paul, Minneapolis & Omaha R. R. Co.	Right-of-way as laid out and located across Section 18, Township 101, Range 49, and Section 13, Township 101, Range 50, West 5th P. M., within the drainage area (1.5 miles)	18 20.320
South Dakota Central Railway Co.	Right-of-way as laid out and located across Sections 4, 5 and 9, Township 101, Range 49, and Sections 29 and 32, Township 102, Range 49 West; 5th p. m. within the drainage area (2 6 miles)	20.80 59.980
228		
Chicago, Milwaukee & St. Paul Railway Co.	Right-of-way as laid out and located across Sections 4 and 9, Township 101, Range 19, and Sections 4, 9, 16, 21, 28, and 33, Township 102, Range 49, and Sections 5, 8, 17, 20, 28, 29 and 33, Township 103, Range 49, and Section 32, Township 104, Range 49 West, 5th p. m. within the drainage area (the above being the Sioux Falls and Egan line); also across Sections 5, 8, and 9, Township 102, Range 49 West, 5th P. M., within the drainage area (being the Renner and Madison line) Total 14.5 miles	167.06 383.130

Be it Further Resolved that Thursday, the 3d day of November, 1910, at two o'clock P. M. at the office of the County Auditor of said County be, and it is hereby fixed as the time and place for the equalizing of said proportion of benefits, and that notice thereof be given in accordance with the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by Chapter 102 of the Laws of 1909 of said State, such notice to be signed by the Chairman of this Board and attested by the County Auditor, by publication in the Sioux Falls Daily Argus Leader once in each

week for two consecutive weeks, and by posting copies of said notice in at least three (3) public places near the route of said drainage ditch, said posting and the last publication of said notice to be made at least ten (10) days prior to the time of said hearing.

Adopted October 7th, 1910.

THOMAS McKINNON, Chairman.

Attest:

(Seal) Henry Howe, County Auditor.

229 Filed in the office of the Auditor of Minnehaha County, S. D., this 7th day of October 1910.

HENRY HOWE,
County Auditor.

Plaintiff offered and there were received in evidence pages 61 to 71, inclusive, of Ditch Record "B", being a record of the notice of hearing on the question of equalization of benefits of Ditch No. 2. This notice of hearing named the same persons and the same property specified in the resolution of the County Commissioners fixing the proportion of benefits of Ditch No. 2.

Plaintiff offered and there were received in evidence pages 153 to 165, inclusive, of Ditch Record "B", the same being a record of the assessment made by the County Commissioners for Drainage Ditch No. 2. This assessment named the same persons and the same property specified in the resolution fixing the proportion of benefits of Drainage Ditch No. 2 and the assessment was made as provided for in said resolution. This record shows that the Commissioners ascertained and determined the entire costs of Ditch No. 2 to be the sum of \$81,106.19.

230 It is stipulated that filed herein as a part of the answer of the defendants are correct copies of the following records of the Board of Commissioners of Minnehaha County, with reference to Drainage Ditch No. 1 and 2, to-wit: the petition of F. L. Blackman and others upon which the proceedings with reference to Drainage Ditch No. 1 and 2 are alleged to have been had, the order for filing said petition, the resolution for survey under said petition, the resolution fixing line and width of the ditch and time and place for hearing the petition of F. L. Blackman and others, the published notice of hear-

ing petition, (such notice not being attached to the answer, but having been filed after the filing of the answer with a stipulation that it might be considered as a part of the answer), and resolution establishing Drainage Ditch No. 1 and 2. Said exhibits were offered in evidence by plaintiff and received in evidence.

(The foregoing exhibits relating to Drainage Ditch No. 1 and 2 are printed herein as a portion of the answer of the defendants and are consequently not herewith reprinted.)

Plaintiff's exhibit "A" was identified by the witness F. E. Ward as one of the records of the office of the County Auditor of Minnehaha County, and was offered in evidence by plaintiff.

To the offer in evidence of plaintiff's exhibit "A" the defendants and intervening defendants objected as incompetent, irrelevant and immaterial to any issue in the case, the same not being pleaded in plaintiff's bill of complaint
231 and part of their case. For the further reason that the apportionment made and set forth in plaintiff's bill of complaint affirmatively appears to be an apportionment made during the year 1921. Plaintiff's exhibit "A" was received in evidence subject to objection and is as follows:

232 Filed
Dec 15 1921

Plaintiffs A
Exhibit B. O. C.

AtM
Jerry Carleton, Clerk

Drainage Notice

To Whom It May Concern:

Notice is hereby given that Tuesday, April 25th, 1919, at Two o'clock P. M., at the office of the County Auditor of Minnehaha County, South Dakota, at the Court House in the City of Sioux Falls, in said County, have been fixed by the Board of County Commissioners of said County as the time and place for equalizing the proportion of benefits to the several lands, tracts, lots, roads, streets and railroad right-of-way embraced within the district of Drainage Ditch No. 1 and 2, and benefitted by the construction of said Drainage Ditch, and that the route of said Drainage Ditch No. 1 and 2 is as follows:

Section One.

Commencing at a point fifty-eight (58) feet west and ten hundred and thirty-five (1035) feet north of the southeast

corner of Section twenty-nine (29) Township One Hundred Two (102), Range Forty-nine (49), West of the 5th P. M., running thence south parallel to the adjacent highway two thousand and eighty-five (2085) feet to station one hundred and fourteen (114); also commencing at a point Six hundred and seventy-four (674) feet north, and about thirty-five (35) degrees west of said station number one hundred and fourteen (114), thence southeasterly six hundred and seventy-four (674) feet to said station number one hundred and fourteen (114), thence south and parallel to said highway seventy-seven hundred (7700) feet to station number thirty-seven (37), thence south forty-five (45) degrees, east three thousand seven hundred (3700) feet to Station number zero (0), the same being on high water line, thence south fifty-nine (59) degrees and thirty-six (36) minutes, east four hundred and fifty (450) feet, thence south thirty-one (31) degrees, east to Big Sioux River, the said line being the center line of said drainage ditch, and is intended to cover the exact location of drainage ditch Number 1 as now established and constructed.

Section Two.

Commencing at a point ten hundred and thirty-five (1035) feet north and fifty-eight (58) feet west of the southeast corner of Section twenty-nine (29), in Township One Hundred and Two (102), Range Forty-nine (49), the same being the commencement point of Section 1, hereinbefore described, running thence north five hundred and forty-seven (547) feet, thence north twenty-three (23) degrees, west Thirty-three hundred and eighteen (3318) feet to a point fifty-eight (58) feet west of the quarter quarter line in the Northeast Quarter of Section Twenty-nine (29), in said Township, thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through Sections Twenty-nine (29), Twenty (20), Seventeen (17), and a part of Section Eight (8), Twelve thousand nine hundred and thirty-five (12,935) feet, thence north fifty (50) degrees east, twenty-seven hundred and thirty-two (2732) feet to a point thirty-three (33) feet west of the west lines of the right of way of the Chicago, Milwaukee & St. Paul Railway Co., in the Northwest Quarter of Section Nine (9), in said Township, thence northerly parallel with and thirty-three (33) feet west of said right of way line nineteen thousand three hundred and sixty-eight (19,368) feet to a connection with the high water channel of the Big Sioux River, in the southeast Quar-

ter of Section Twenty (20), in Township One Hundred and Three (103), north of Range Forty-nine (49).

Section Three.

Commencing at a point sixteen hundred and forty (1640) feet east of the center of Section Eighteen (18), in Township One Hundred and Three (103), Range Forty-nine (49);

234 running thence north thirty-three (33) degrees west thirty one hundred fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8), in said Township; thence north parallel with and sixty (60) feet west of the quarter line in Section Seven (7) and Six (6) in said Township, and in Section Thirty-one (31), in Township One Hundred and Four (104), North of Range Forty-nine (49), to the center line running east and west through said Section Thirty-one (31); thence northeasterly to the creek near the northeast corner of said Section Thirty-one (31), the said line being the center line of said proposed drainage.

That in addition thereto the Big Sioux River has been or is being straightened and the channel changes made as follows: Channel changes on Sections Five (5) and Seven (7), Township One Hundred and One (101), Range Forty-nine (49); Channel changes on Section Thirty-two (32), Twenty-nine (29), Twenty (20), Eighteen (18), Seventeen (17), Eight (8) and Five (5), Township One Hundred and Two (102), Range Forty-nine (49); and Channel changes on Sections Thirty-two (32), and Twenty-nine (29), Township One Hundred and three (103), Range Forty-nine (49); the same being in accordance with the lines of said Drainage Ditch as actually constructed and for which the said Board of County Commissioners has heretofore assessed condemnation damages; that maps and profiles of said Drainage Ditch are now on file in the office of the County Auditor of said County, to which reference is hereby made.

That there have been included within the drainage area of Drainage Ditch 1 and 2 the entire drainage area of Drainage Ditches No. 1 and No. 2 heretofore established and constructed, and additional territory contiguous thereto, which is benefitted by the establishment and construction of said

235 Drainage Ditch No. 1 and 2, and that in the judgment of said Board of County Commissioners all of said territory is interdependent, and is considered as one drainage system, that in the determination of the proportion of benefits fixed upon the lands and premises embraced within

said drainage area, the amounts of the assessments heretofore made in the matter of Drainage Ditch No. 1 and Drainage Ditch No. 2 have been taken into consideration.

That in the consideration and assessment of benefits, as hereinafter set forth, the said Board of County Commissioners have assumed that the Southeast Quarter of the Northeast Quarter of the Northeast Quarter of Section 20, in Township 103, Range 49, West of the 5th P. M., owned by Martha R. Roberts, and containing ten acres, is benefitted "one"; also that Lot 1, in Block 22 of J. L. Phillips' Addition, owned by G. Keriakedes, containing a single lot, is benefitted "one", and that County Auditor's Tract 14 of the Southwest Quarter of Section 16, Township 101, Range 49, except the east 132 feet thereof, owned by Albert Larson and George E. Larson, is benefitted "one", and taking the said lands, tracts and lots as a unit, the proportion of benefits to each and all of the lands, tracts, lots, roads, streets and railroad right-of-way and the description of each tract of land affected by said drainage, and the names of the owners thereof, as they appear from the records in the office of the Register of Deeds of Minnehaha County, South Dakota, at the date of said petition and at the date of filing said

236 petition, [and at the date of filing said petition], was fixed as follows:

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Fred Nelson	W½ of NE¼	4	101	49	57.00	6.897
State of South Dakota	E½ of NE¼ of NW¼	4	101	49	19.5	2.952
State of South Dakota	W½ of NE¼ of NW¼	4	101	49	19.5	2.952
State of South Dakota	(Except right-of-way of C. M. & St. P. Ry. Co. and S. D. Central Ry.) that part of SW¼ lying South and West of the center line of Drainage Ditch No. 1	4	101	49	12.33	1.863
State of South Dakota	(Except right-of-way of C. M. & St. P. Ry.) W½ of NW¼	4	101	49	70.6	10.684
Fred Nelson	SE¼ of NW¼	4	101	49	40.0	6.05
State of South Dakota	(Except right-of-way of C. M. & St. P. Ry.) that part of SW¼ lying North and East of the center line of Drainage Ditch No. 1	4	101	49	131.53	19.898

Mary C. Brace	NW¼ of SE¼	4	101	49	30.00	4.538
Mary Brix	Tract 1 of SE¼	4	101	49	3.50	0.532
Mary C. Brace	(Except Tracts 1 and 2) SW¼ of SE¼	4	101	49	8.00	1.21
Hans Ruvald	(Except right-of-way of S. D. Central Ry) NE¼ of NE¼	5	101	49	35.04	5.299
Olander Benson	NW¼ of NE¼	5	101	49	39.66	6.001
Sam Helm	SW¼ of NE¼	5	101	49	40.00	6.05
Hans Ruvald	(Except right-of-way of S. D. Ry) SE¼ of NE¼	5	101	49	34.45	5.215
A. C. Jensen	NE¼ of NW¼	5	101	49	36.22	5.481
D. A. Scott	NW¼ of NW¼	5	101	49	38.00	5.748
238						
F. H. Johnson	SW¼ of NW¼	5	101	49	38.00	5.750
Hans Ruvald	SE¼ of NW¼	5	101	49	38.00	5.750
Hans C. Ruvald	NE¼ of SW¼	5	101	49	39.50	5.977
Mary C. Brace	(Except Blocks 34, 35, 49, 50 and 61 of N. Boulevard Addition to Sioux Falls) S½ of SW¼	5	101	49	66.50	9.588

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benef.
F. H. Johnson	NW¼ of SW¼	5	101	49	38.50	5.699
State of South Dakota	(Except right-of-way of S. D. Central Ry Co.) NE¼ of SE¼	5	101	49	34.45	5.215
Hans Ruvald	NW¼ of SE¼	5	101	49	40.00	6.05
Mary C. Brace	(Except Blocks 4, 6, 9, 13 and 29 of N. Boulevard Addi- tion to Sioux Falls, and except right-of-way of S. D. Central Ry Co.) S½ of SE¼	5	101	49	62.66	9.474
D. A. Scott	N½ of SE¼	6	101	49	40.00	4.84
F. H. Johnson	S½ of NE¼	6	101	49	42.00	5.082
F. H. Johnson	N½ of SW¼	6	101	49	14.00	1.694
George E. Barkley	S½ of SW¼	6	101	49	40.00	4.84
F. H. Johnson	N½ of SE¼	6	101	49	73.00	8.803
George E. Berkley	SW¼ of SE¼	6	101	49	38.50	4.659

A. G. Erskine	Tract 1 of SE¼	6	101	49	23.00	2.783
Frances G. Carpenter	Tract 2 of SE¼	6	101	49	15.00	1.815
Frances G. Carpenter	NE¼ of NE¼	7	101	49	40.00	4.84
Frances G. Carpenter	SE¼ of NE¼	7	101	49	40.00	4.84
H. O. Gates & E. J. Sharon	W½ of NE¼	7	101	49	79.50	9.293
H. O. Gates & E. J. Sharon	E½ of NE¼	7	101	49	50.00	6.05
239						
F. H. Johnson	SW¼ of NW¼	7	101	49	5.00	0.805
E. J. Sharon & F. L. Blackman						

The unplatted part of W½ of SE¼ and of E½ of SW¼ of
(Except that tract lying North of Block 37 of Meredith's Second Addition to Sioux Falls, and South of center line of Mullberry St., extended West and East of center line of Harvard St., extended and West of center line of Hooker St. extended; also except that portion of Tract 1 lying between Monroe St., extended West and the center line of Manchester Street extended West

7 101 49

37.00 4.477

Proportion of Benefit

Name of Owner	Description	Sec.	Twp.	R	Acres	Benefit
B. A. Burtch & Henry Brookhouse, Jr.	That part of Tract 1 of SW¼ lying N. of Block 37 Meredith's Second Addition to Sioux Falls, and S. of center line of Mullberry St. extended West and East of center line of Harvard St., extended and West of center line of Hooker St. extended.	7	101	49	1.50	1.815
Henry Brookhouse, Jr.	That part of Tract 1 of SW¼ lying between Monroe St. extended and West of center line of Manchester Street extended West,	7	101	49	1.50	0.182
Richard J. Ford	NW¼ of SW¼	7	101	49	18.00	2.178
J. A. Redfield	N½ of SW¼ of SW¼	7	101	49	15.00	1.815
J. A. Redfield	SE¼ of SW¼ of SW¼	7	101	49	7.5	0.908

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Frances G. Carpenter	N½ of NE¼	8	101	49	80.0	9.68
Frances G. Carpenter	N½ of NW¼	8	101	49	80.0	9.68
C. E. McKinney	N½ of SW¼	8	101	49	80.0	9.68
E. B. Northrup	SW¼ of SW¼	8	101	49	40.0	4.84
Elmer S. Gilbert	SE¼ of NE¼ of SE¼	8	101	49	5.0	1.10
Frances G. Carpenter	(Except Block 40 of Central Park Add. to Sioux Falls) SW¼ of NW¼	8	101	49	37.50	4.537
Frances G. Carpenter	(Except Blocks 5, 8, 12, and 21 of Central Park Add. to Sioux Falls) SW¼ of NE¼	8	101	49	30.00	3.63
Frances G. Carpenter	NW¼ of NW¼ of SE¼ of NE¼	8	101	49	2.50	0.302
State of South Dakota	That part lying East of the right-of-way of the C. M. & St. P. Ry Co. of S½ of NW¼	9	101	49	14.5	1.755
Frances G. Carpenter	(Except Blocks 33, 48 and 49 of Central Park Add. to Sioux Falls) SE¼ of NW¼	8	101	49	32.50	3.933
Catherine W. Peck & Porter P. Peck	(Except Block 1 and Lots 10, 11 and 12 of Block 34 of Millard Park Add. to Sioux Falls) Tract 1 of NW¼	17	101	49	83.92	10.152

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Catherine W. Peck & Porter P. Peck	Tract 2 of NW¼	17	101	49	12.6	1.524
Catherine W. Peck & Porter P. Peck	Tract 4 of NW¼	17	101	49	0.3	0.036
Maria Winker	Tract 1 of SW¼	17	101	49	12.0	1.452
Francis D. Hoskins	Tract 2 of SW¼	17	101	49	1.85	0.205
Frances G. Carpenter	Tract 3 of SW¼	17	101	49	1.1	0.133

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Security & Guaranty Co.	(Except lots 1, 2, 3, 4, 5, and 6 of Block 3, Lincoln Park Add. to Sioux Falls) NE¼ of NE¼	18	101	49	37.25	4.513
Porter P. Peck	SE¼ of NE¼	18	101	49	35.00	4.235
August Gustafson	SW¼ of NE¼	18	101	49	40.00	4.84
August Gustafson	SE¼ of NW¼	18	101	49	40.00	4.84

W. H. Lyon	(Except right-of-way of C. M. & St. P. Ry Co) NW $\frac{1}{4}$ of SW $\frac{1}{4}$	18	101	49	33.96	4.114
W. H. Lyon	SW $\frac{1}{4}$ of NW $\frac{1}{4}$	18	101	49	37.00	4.477
S. A. Gehrig	(Except right of way of C. M. & St. P. Ry. Co) NE $\frac{1}{4}$ of SW $\frac{1}{4}$	18	101	49	38.48	4.858
Marcus Russell	W $\frac{1}{2}$ of NW $\frac{1}{4}$ of SE $\frac{1}{4}$	18	101	49	30.00	2.42
Marcus Russell	SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of SE $\frac{1}{4}$	18	101	49	2.5	0.301
Marcus Russell	N $\frac{1}{2}$ of NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of SE $\frac{1}{4}$	18	101	49	5.0	0.805
Soo Valley Granite Co.	That part of NW $\frac{1}{4}$ of NW $\frac{1}{4}$, lying East of the Big Sioux River (Except Block 89 of Sioux Falls Imp. Co Add to Sioux Falls					0.805
S. Widmark	Tract 1 of NW $\frac{1}{4}$	18	101	49	2.0	0.242
Soo Valley Granite Co.	That part of NW $\frac{1}{4}$ of NW $\frac{1}{4}$ lying West of Big Sioux River (Except Tract 1 and lots 1, 2, 3, 4, 12, 13, 14, 15, 16, 17, & 18 of Block 91 of Sioux Falls Imp. Co. Add. to Sioux Falls	18	101	49	14.00	1.694

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit
George J. Morris	(Except right-of-way of C. St. P. M. & O. Ry. Co) East 10 acres of S $\frac{1}{2}$ of SW $\frac{1}{4}$	18	101	49	9.37	1.137
German State Bank	(Except right-of-way of C. St. P. M. & O. Ry Co) W. 70 acres of S $\frac{1}{2}$ of SW $\frac{1}{4}$	18	101	49	64.35	7.792
O. C. Bratrud	E $\frac{1}{2}$ of NE $\frac{1}{4}$	19	101	49	9.5	1.149
Laura A. Darling	S $\frac{1}{2}$ of NE $\frac{1}{4}$	19	101	49	2.0	0.242
Den Donahoe & W. M. Donahoe	(Except Block 13 of West Lawn Add. to Sioux Falls) E $\frac{1}{2}$ of NW $\frac{1}{4}$	19	101	49	77.5	8.525
E. V. Rowley	W $\frac{1}{2}$ of NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of NW $\frac{1}{4}$	19	101	49	5.0	0.550
Ludwig Seubert	SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of NW $\frac{1}{4}$	19	101	49	2.5	0.275
Jean Obert	NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of NW $\frac{1}{4}$	19	101	49	2.5	0.275
Dan A. Donahoe	NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of NW $\frac{1}{4}$	19	101	49	9.0	0.990

Dan A. Donahoe	S½ of NW¼ of NW¼	19	101	49	19.0	2.090
Daniel A. Donahoe	SW¼ of NW¼	19	101	49	38.00	4.180
Amelia Bauch	(Except the N. 50 rods) Tract 1 of SW¼	19	101	49	14.5	1.595
W. H. Fullerton, Thomas Fullerton, Geo. J. Fullerton & Leopold Guertin	Tracts 2 & 3 of SW¼	19	101	49	7.45	0.825
Thomas F. Loughran & Louis Bauch	Tract 4 of SW¼	19	101	49	8.0	0.880
Mary R. Guertin	North 4 acres of Tract 5 of SW¼	19	101	49	4.0	0.440
J. H. Fernyhough	S 4 acres of Tract 5 of SW¼	19	101	49	4.0	0.440

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Daniel A. Donahoe Den Donahoe & Wm. Donahoe	Tract 8 of SW¼	19	101	49	0.75	0.082
Daniel A. Donahoe Den Donahoe and Wm. Donahoe	Tract 10 of SW¼	19	101	49	8.0	0.880
Stella I. Simpson	N½ of NW¼	30	101	49	18.0	1.980
Stella I. Simpson	SW¼ of NW¼	30	101	49	32.0	3.520
Harry A. Chetham	NW¼ of SW¼	30	101	49	20.0	2.200
J. T. Norris	SW¼ of SW¼	30	101	49	33.0	3.630

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Lottie Frank and Ethel F. Neister	(Except the right-of-way of C. St. P. & M. O. Ry. Co. and except the West 13 rods and 4 ft) E½ of NE¼	13	101	50	42.0	5.082
Lottie Frank and Ethel F. Neister	W½ of NE¼	13	101	50	30.0	3.630
Lottie Frank and Ethel F. Neister	W. 13 rods and 4 ft. of E½ of NE¼	13	101	50	7.5	0.908
Hayward Investment Co.	(Except right-of-way of C. St. P. M. & O. Ry Co) E½ of SW¼	13	101	50	30.9	3.729
W. H. Lyon	(Except right-of-way of C. St. P. M. & O. Ry Co) NE¼ of SE¼	13	101	50	32.53	3.983
Lottie Frank and Ethel F. Neister	(Except right-of-way of C. St. P. M. & O. Ry Co) NW¼ of SE¼	13	101	50	36.97	4.477
Louis Lissinger	S½ of SE¼	13	101	50	73.0	8.833

Charley Gibson	A tract beginning at the N/E. Corner of running thence W. 320 ft. thence S. 120 ft. thence S. 70 degrees E. 320 ft. thence N. 20 degrees E. 52 ft. thence North 180 ft. to beginning	24	101	50		
					1.78	0.217

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Louis P. Caldwell	(Except the tract last above described) NE $\frac{1}{4}$ of NE $\frac{1}{4}$	24	101	50	33.7	4.078
William Gage	NW $\frac{1}{4}$ of NE $\frac{1}{4}$	24	101	50	8.0	2.198
P. M. Smith	W $\frac{1}{2}$ of NW $\frac{1}{4}$	3	102	49	20.7	1.773
John Sittig	E $\frac{1}{2}$ of NE $\frac{1}{4}$	4	102	49	77.14	9.329
Ole E. Eggen	W $\frac{1}{2}$ of NE $\frac{1}{4}$	4	102	49	78.49	9.492
Gurine Peterson	E $\frac{1}{2}$ of NW $\frac{1}{4}$	4	102	49	78.04	11.527
Ole T. Ampaas	(Except right-of-way of C. H. & St. P. Ry Co.) W $\frac{1}{2}$ of NW $\frac{1}{4}$	4	102	49	69.66	9.672
Ole T. Nessen	NE $\frac{1}{4}$ of SW $\frac{1}{4}$	4	102	49	40.00	5.95
Andrew P. Brende	SE $\frac{1}{4}$ of SW $\frac{1}{4}$	4	102	49	40.00	5.835

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Martin H. Oyen and Cleopatra H. Oyen	(Except right-of-way of C. M. & St. P. Ry Co) W $\frac{1}{2}$ of SW $\frac{1}{4}$	4	102	49	72.00	9.272
Ole T. Nessen	SE $\frac{1}{4}$	4	102	49	118.00	14.278
Ole Thompson Aspaas	E $\frac{1}{2}$ of NE $\frac{1}{4}$	5	102	49	72.37	11.052
O. O. Gilseth	NW $\frac{1}{4}$ of NE $\frac{1}{4}$	5	102	49	37.4	4.934
O. O. Gilseth	W $\frac{1}{4}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$	5	102	49	29.0	3.828
O. O. Gilseth	NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$	5	102	49	1.5	0.198
John Brekke	E $\frac{1}{2}$ of SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$	5	102	49	5.0	0.66
John Brekke	SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$	5	102	49	1.5	0.199
O. O. Gilseth	(Except right-of-way of C. M. & St. P. Ry Co.) NW $\frac{1}{4}$	5	102	49	40.00	4.80
P. J. Merakergaard	(Except right-of-way of C. M. & St. P. Ry. Co) SW $\frac{1}{4}$	5	102	49	73.4	8.048

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Martin H. Oyen and Cleopatra H. Oyen	(Except right-of-way of C. M. & St. P. Ry Co) SE $\frac{1}{4}$	5	102	49	140.48	20.915
Erick O. Evjebak and Olaf Gilseth	Tract 1 of SE $\frac{1}{4}$	5	102	49	9.32	2.186

Martin H. Oyen	(Except right-of-way of C. M. & St. P. Ry Co) E½ of NE¼	8	102	49	72.3	11.653
Martin H. Oyen	That part North and East of right-of-way of C. M. & St. P. Ry Co. of W½ of NE¼	8	102	49	2.0	0.264
Ole Gunderson	That part South and West of right-of-way of C. M. & St. P. Ry Co., of W½ of NE¼ (except the north 50 rods of that part West of river	8	102	49	65.4	9.537
J. L. Ingalls	The North 50 rods of that part West of River of W½ of NE¼	8	102	49	3.0	0.64
Ole Gunderson	(Except the South 50 rods of) NE¼ of NW¼	8	102	49	22.00	2.904

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Ole Gunderson	The South 30 rods of NE¼ of NW¼	8	102	49	22.00	2.904
Ole Gunderson	S½ of NW¼	8	102	49	38.00	5.475
Ole Gunderson	NE¼ of SW¼	8	102	49	40.00	5.85
Iver Nelson	(Except 2½ acres in square form in SE Corner) NW¼ of SW¼	8	102	49	17.5	2.310
M. O. Benrud	2½ acres in square form in SE corner of NW¼ of SW¼	8	102	49	2.5	0.33
Jonas Olsen	SW¼ of SW¼	8	102	49	30.00	3.96
Ole Gunderson	SE¼ of SW¼	8	102	49	39.00	5.735

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Nellie A. Walkins	(Except 1 acre in square form in NW corner) NE¼ of SE¼	8	102	49	38.16	5.575
School District No. 2	1 acre in square form in NW Corner) of NE¼ of SE¼	8	102	49	0.84	0.136
Ole Gunderson	W½ of SE¼	8	102	49	76.0	12.705
C. H. Renner	SE¼ of SE¼	8	102	49	38.0	8.156
Andrew P. Brende	N½ of NE¼	9	102	49	50.00	6.05
Alfred Christianson	S½ of NE¼	9	102	49	38.00	4.598
Ole T. Nesson	NE¼ of NW¼	9	102	49	32.00	4.752

Martin H. Oyen	That part West of the Southern Minn. R. R. right-of-way of W $\frac{1}{2}$ of NW $\frac{1}{4}$ (except right-of-way of Madison Line of C. M. & St. P. Ry. Co.	9	102	49	41.4	5.565
Alfred Christianson	That part East of the Southern Minn. R. R. Right-of-way of W $\frac{1}{2}$ of NW $\frac{1}{4}$	9	102	49	31.0	4.604
Andrew P. Brende	SE $\frac{1}{4}$ of NW $\frac{1}{4}$	9	102	49	40.00	5.313
Jonas Olsen	(Except the plat of Olsen's Add. to Renner) E $\frac{1}{2}$ of SW $\frac{1}{4}$	9	102	49	71.85	9.24
C. H. Renner	(Except rights-of-way of C. M. & St. P. Ry Co. and except the town plat of Renner) W $\frac{1}{2}$ of SW $\frac{1}{4}$	9	102	49	69.7	9.71
Christian Christianson	N $\frac{1}{2}$ of SE $\frac{1}{4}$	9	102	49	20.00	2.42

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit
Jonas Olsen	S $\frac{1}{2}$ of SE $\frac{1}{4}$	9	102	49	18.00	2.078
Jonas Olsen	NW $\frac{1}{4}$ of NE $\frac{1}{4}$	16	102	49	2.00	0.242
Barney Finnegan	SW $\frac{1}{4}$ of NE $\frac{1}{4}$	16	102	49	23.00	2.783
John Bliss	E $\frac{1}{2}$ of NW $\frac{1}{4}$	16	102	49	75.00	9.075
Leonard Renner	(Except right-of-way of C. M. & St. P. Ry Co) W $\frac{1}{2}$ of NW $\frac{1}{4}$	16	102	49	73.00	9.92
Michael P. Brende	NE $\frac{1}{4}$ of SW $\frac{1}{4}$	16	102	49	40.00	4.84
Mary P. Brende	(Except right-of-way of C. M. & St. P. Ry Co) NW $\frac{1}{4}$ of SW $\frac{1}{4}$	16	102	49	36.9	5.02
Ole O. Velden	(Except right-of-way of C. M. & St. P. Ry. Co) SW $\frac{1}{4}$ of SW $\frac{1}{4}$	16	102	49	36.95	4.948
Ole O. Velden and Thomine O. Velden	SE $\frac{1}{4}$ of SW $\frac{1}{4}$	16	102	49	33.0	3.993
Mary P. Brende	NW $\frac{1}{4}$ of SE $\frac{1}{4}$	16	102	49	19.0	2.299
S. P. Brende	SW $\frac{1}{4}$ of SE $\frac{1}{4}$	16	102	49	25.0	3.025
F. I. Renner	E $\frac{1}{2}$ of NE $\frac{1}{4}$	17	102	49	77.0	11.944
Gertie R. Peterson	NW $\frac{1}{4}$ of NE $\frac{1}{4}$	17	102	49	38.0	5.841
Gertie R. Peterson	N $\frac{1}{2}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$	17	102	49	19.5	3.001
Iver R. Peterson	S $\frac{1}{2}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$	17	102	49	19.5	3.001

Gertie R. Peterson	NE¼ of NW¼	17	102	49	39.0	5.733
Ingeberg Peterson	NW¼ of NW¼	17	102	49	18.0	2.376
Bernt Mekvold	SW¼ of SW¼	17	102	49	33.0	4.356
Bernt Mekvold	W 26 a/3 acres of SE¼ of NW¼	17	102	49	26.67	3.726

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Gertie R. Peterson	N½ of East 13 Acres of SE¼ of NW¼	17	102	49	6.5	0.105
Iver R. Peterson	S½ of East 13 acres of SE¼ of NW¼	17	102	49	6.5	0.105
C. C. Fleischer	E½ of SW¼	17	102	49	80.00	11.673
C. C. Fleischer	NW¼ of SW¼	17	102	49	37.0	4.884
T. P. Horton	E¼ of SW¼ of SW¼	17	102	49	18.0	3.376
Nels I. Nelson	W½ of SW¼ of SW¼	17	102	49	20.0	2.84
Jonas Olsen	E½ of SE¼	17	102	49	78.00	12.092

Proportion of Benefit.

Name of Owner	Description	Sec.	Twp.	R	Acres	Benefit.
C. J. Orstad	W½ of SE¼	17	102	49	78.00	12.732
W. O. Quincy	E½ of NE¼	19	102	49	3.00	0.396
Henry J. Schimmel	NE¼ of NE¼	20	102	49	39.00	6.318
Albert N. Allis	W½ of NE¼	20	102	49	78.00	12.049
O. S. Pendar	SE¼ of NE¼	20	102	49	39.00	6.318
Albert N. Allis	E½ of NW¼	20	102	49	76.00	11.207
W. O. Quincy	W½ of NW¼	20	102	49	74.00	9.768
R. J. Huston	N½ of SW¼	20	102	49	73.00	10.238
R. J. Huston	NW¼ of SE¼	20	102	49	39.00	6.025
Chas. E. Kaufman	S½ of SW¼	20	102	49	70.00	9.84
O. S. Pendar	E½ of SE¼	20	102	49	78.00	12.684
O. S. Pendar	SW¼ of SE¼	20	102	49	38.00	6.103
Ole O. Volden and Thomine O. Volden	NW¼ of NE¼	21	102	49	12.00	1.452
E. Larson	(Except right-of-way of C. M. & St. P. Ry. Co.) NW¼	21	102	49	151.85	19.473
Michael P. Brende	E¼ of SW¼	21	102	49	39.5	4.785
Paul H. Brende and Martha O. Brende	(Except right-of-way of C. M. & St. P. Ry. Co.) NW¼ of SW¼	21	102	49	36.95	3.025

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O. S. Pendar	(Except right-of-way of C. M. & St. P. Ry. Co) SW $\frac{1}{4}$ of SW $\frac{1}{4}$	21	102	49	35.95	4.891
J. A. Erickson	(Except right-of-way of C. M. & St. P. Ry Co) NW $\frac{1}{4}$	28	102	49	142.25	18.890
Alfred Christensen	(Except right-of-way of C. M. & St. P. Ry Co.) SW $\frac{1}{4}$	28	102	49	118.20	19.521
Chas. E. Kaufmann	NE $\frac{1}{4}$	29	102	49	154.5	24.43
Chas. E. Kaufmann	NE $\frac{1}{4}$ of NW $\frac{1}{4}$	29	102	49	39.0	5.748
Carrie Erickson and John A. Erickson	W $\frac{1}{2}$ of NW $\frac{1}{4}$	29	102	49	57.0	7.524
M. P. Brende and S. P. Brende	(Except tract 1) SE $\frac{1}{4}$ of NW $\frac{1}{4}$	29	102	49	2.5	0.320

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
M. P. Brende and S. P. Brende	Tract 1 of SW $\frac{1}{4}$	29	102	49	36.0	5.052
Erick O. Eggen	(Except Tracts 1 and 2) NE $\frac{1}{4}$ of SW $\frac{1}{4}$	29	102	49	10.2	1.658
M. P. Brende and S. P. Brende	Tract 1 of SW $\frac{1}{4}$	29	102	49	7.8	1.270
Ole O. Eggen	Tract 2 of SW $\frac{1}{4}$	29	102	49	21.5	3.486
Carrie Erickson and John A. Erickson	(Except right-of-way of S. D. Central Ry Co) W $\frac{1}{2}$ of SW $\frac{1}{4}$	29	102	49	38.62	6.259
Ellen Berg and Mary Schodjt	(Except right-of-way of S. D. Central Ry Co.) SE $\frac{1}{4}$ of SW $\frac{1}{4}$	29	102	49	36.49	5.911
Chas. E. Kaufman	NE $\frac{1}{4}$ of SE $\frac{1}{4}$	29	102	49	39.00	7.309
Mary Schodjt and Ole P. Schodjt	(Except $\frac{1}{2}$ acre next below described) NW $\frac{1}{4}$ of SE $\frac{1}{4}$	29	102	49	36.5	6.681
School District No. 17	A tract in the Southeast corner (8 rods North and South by 10 rods East and West) NW $\frac{1}{4}$ of SE $\frac{1}{4}$	29	102	49	0.38	0.062

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Mary Schodjt and Ole P. Schodjt	SW $\frac{1}{4}$ of SE $\frac{1}{4}$	29	102	49	35.25	6.24
State of South Dakota	SE $\frac{1}{4}$ of SE $\frac{1}{4}$	29	102	49	35.5	6.786
G. E. Eggen, Guru E. Eggen, Ole E. Moen, Gurine E. Moen and Edward E. Moen	E $\frac{1}{2}$ of NE $\frac{1}{4}$	31	102	49	5.0	0.584
K. O. Jellum	E $\frac{1}{2}$ of SE $\frac{1}{4}$	31	102	49	43.0	5.106

State of South Dakota	E½ of NE¼	32	102	49	72.9	12.025
Mary Schojdt and Ole P. Schojdt	(Except right-of-way of S. D. Central Ry Co) NW¼ of NE¼	32	102	49	35.88	5.913
Joe H. Whitman	(Except Right-of-way of S. D. Central Ry Co.) SW¼ of NE¼	32	102	49	37.78	6.230
G. E. Eggen, Guru E. Eggen, Ole E. Moen Gurine E. Moen, and Edward E. Moen	(Except right-of-way of S. D. Central Ry Co) N½ of NW¼	32	102	49	66.85	10.929
G. E. Eggen, Guru E. Eggen, Ole E. Moen, Gurine E. Moen, and Edward E. Moen	SW¼ of NW¼	32	102	49	40.0	6.6
						Proportion of Benefit.
Name of Owner	Description	Sec.	Twp.	R	Acres	
J. M. Whitman	That part West of River of N½ of SE¼ of NW¼	32	102	49	6.0	0.831
State of South Dakota	That part East of River of N¼ of SE¼ of NW¼	32	102	49	13.0	2.151
Erza M. Shotwell	North 3 acres of S½ of SE¼ of NW¼	32	102	49	3.0	0.488
W. H. Lyon	South 5 acres of North 8 Acres of S½ of SE¼ of NW¼	32	102	49	5.0	0.488
Thomas Paulson	South 2 acres of N½ of S½ of SE¼ of NW¼	32	102	49	2.0	0.330
N. E. W. Brakke	S½ of S½ of SE¼ of NW¼	32	102	49	10.0	1.650
251						
K. O. Jellum	SW¼	32	102	49	152.0	25.08
State of South Dakota	NE¼ of SE¼	32	102	49	37.50	6.190
J. E. Colton	(Except right-of-way of S. D. Central Ry Co) NW¼ of SE¼	32	102	49	37.98	6.270
Thomas S. Nolan	(Except right-of-way of S. D. Central Ry Co.) SW¼ of SE¼	32	102	49	38.01	6.270
State of South Dakota	(Except right-of-way of S. D. Central Ry. Co.) SE¼ of SE¼	32	102	49	36.69	6.096
Francis A. Miller	(Except right-of-way of C. M. & St. P. Ry Co.) N½	33	102	49	110.2	14.531
State of South Dakota	(Except right-of-way of C. M. & St. P. Ry. Co) N½ of SW¼	33	102	49	76.0	10.285

O. Benson	(Except right-of-way of C. M. & St. P. Ry Co) S½ of SW¼	33	102	49	72.0	10.140
O. Benson	W½ of SE¼	33	102	49	60.0	7.26
Ole O. Langness	(Except right-of-way of C. M. & St. P. Ry. Co.) NE¼ of NW¼	5	103	49	10.29	1.131
Baltic Creamery Co.	A tract 10½ rods West and East by 15 rods North and South in NE corner of NW¼ of NW¼	5	103	49	0.85	0.93
Olaf N. Lyng	(Except the tract last above described) NW¼ of NW¼	5	103	49	33.93	3.732

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
J. O. Langness	That part South of River of SW¼ of SW¼	5	103	49	8.0	0.88
Halver Gunderson	(Except right-of-way of C. M. & St. P. Ry Co) SE¼ of NW¼	5	103	49	3.0	0.330
252						
Sena C. Langness	NE¼ of SW¼	5	103	49	36.75	4.315
John Langness	Tract 1 of SW¼	5	103	40	11.00	1.33
A. J. Floren	Tract 2 of SW¼	5	103	49	6.00	0.726
Gunerius Thompson	Tract 3 of SW¼	5	103	49	3.57	0.392
Gunerius Thompson	Tract 4 of SW¼	5	103	49	1.0	0.11
Gunerius Thompson	Tract 5 of SW¼	5	103	49	34.43	4.165
Gunerius Thompson	(As shown in Book 5 of Plate Page 51) Lot 1 of Tract 6 of SW¼	5	103	49	28.41	3.125
Gunerius Thompson	(Except the tract last above described) Tract 6 of SW¼	5	103	49	2.84	0.312
Gunerius Thompson	Tract 7 of SW¼	5	103	49	27.0	2.97
Halver Gunderson	(Except right-of-way of C. M. & St. P. Ry Co) NW¼ of SE¼	5	103	49	1.50	0.182
Halver Gunderson	(Except right-of-way of C. M. & St. P. Ry Co.) North 3 acres of SW¼ of SE¼	5	103	49	1.0	0.121
J. O. Langness	(Except the North 3 acres and except the right-of-way of C. M. & St. P. Ry Co) SW¼ of SE¼	5	103	49	17.33	8.097

Mari Lee, Libbie Lang					
Carrie Lee, Etta M.					
Lee, Tilda Lee, Mabel	NE¼ of NE¼	6	103	49	38.81 4.827
O. Lee, and Thomas E.	and S½ of NE¼	6	103	49	69.83 9.106
Lee	and N½ of SE¼	6	103	49	75.82 9.876
John Williamson	NW¼ of NE¼	6	103	49	38.60 5.320
Even O. Fossum	NE¼ of NW¼	6	103	49	35.11 5.793
Knud Larson	W¼ of NW¼	6	103	49	43.00 6.958
Lina Hanson	N½ of N½ of SE¼ of NW¼	6	103	49	9.05 1.484
K. P. Sorklime	(As described in Book 53 of Deeds, page 434) Lot 1 of SE¼ of NW¼	6	103	49	17.84 2.911

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Gunerius Thompson	That part South of Lot 1 as last above described of SE¼ of NW¼	6	103	49	9.50	1.568
Gunerius Thompson	N½ of NE¼ of SW¼	6	103	49	18.08	2.985
Gunerius Thompson	N½ of NE¼ of SW¼	6	103	49	18.09	2.985
A. L. Berg	S½ of SW¼	6	103	49	59.75	9.302
Gunerius Thompson	SE¼ of SW¼	6	103	49	35.18	5.805
Gunerius Thompson	S½ of SE¼	6	103	49	77.82	10.164
Gunerius Thompson	N½ of NE¼	7	103	49	77.0	10.074
Julia Johnson	S½ of NE¼	7	103	49	78.32	10.247
Ole J. Ustrud and H. O. Ustrud	NE¼ of NW¼	7	103	49	38.18	5.705
Knut O. Larson	W½ of NW¼	7	103	49	59.75	9.302
Ole O. Ustrud and C. C. Sando	SE¼ of NW¼	7	103	49	36.18	5.970
Magnild Floren	NE¼ of SW¼	7	103	49	86.18	5.970
Ole O. Floren	W½ of SW¼	7	103	49	34.40	5.594
Ole O. Floren	SE¼ of SW¼	7	103	49	35.18	5.855
Julia Johnson	N½ of SE¼	7	103	49	78.32	10.247
John Thompson	SW¼ of SE¼	7	103	49	38.82	5.338
John P. Risvold	Tract 1 of SE¼	7	103	49	3.21	0.397
Anders S. Aas	Tract 2 of SE¼	7	103	49	15.50	2.035
Ingeberg Risvold	Tract 3 of SE¼	7	103	49	12.00	1.320
Peder P. Risvold	Tract 4 of SE¼	7	103	49	4.87	0.536
Sivert E. Kringen	(Except right-of-way of C. M. & St. P. Ry Co) N½ of NE¼	8	103	49	38.67	4.679

John P. Risvold	(Except right-of-way of C. M. & St. P. Ry Co.) SW $\frac{1}{4}$ of NE $\frac{1}{4}$	8	103	49	36.00	4.356
John P. Risvold	North 25 acres of SE $\frac{1}{4}$ of NE $\frac{1}{4}$	8	103	49	21.00	2.541
Peder P. Risvold	South 15 acres of SE $\frac{1}{4}$ of NE $\frac{1}{4}$	8	103	49	15.00	1.815

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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
C. M. Christianson, Halvor Gunderson and Maria Langness	NE $\frac{1}{4}$ of NW $\frac{1}{4}$	8	103	49	35.50	3.905
Gunerius Thompson	As shown in Book 5 of Plats, page 51, Tract 1 of NW $\frac{1}{4}$ of NW $\frac{1}{4}$	8	103	49	6.70	0.737
Gunerius Thompson	(Except Tract 1 of last above described) NW $\frac{1}{4}$ of NW $\frac{1}{4}$	8	103	49	29.16	3.208
Annie M. Kringen	(As described in Book 26 of Deeds, page 507) SW 4 $\frac{1}{2}$ acres of SW $\frac{1}{4}$ of NW $\frac{1}{4}$	8	103	49	4.5	0.495
John O. Langness	(Except the Tract last above described) SW $\frac{1}{4}$ of NW $\frac{1}{4}$	8	103	49	33.50	3.685
Jens Erickson	SE $\frac{1}{2}$ of NW $\frac{1}{4}$	8	103	49	39.00	4.290
Jens Erickson	NE $\frac{1}{4}$ of SW $\frac{1}{4}$	8	103	49	39.00	4.290
Sara Vollan	NW $\frac{1}{4}$ of SW $\frac{1}{4}$	8	103	49	37.50	4.125
Anders P. Risvold	North 30 acres of SW $\frac{1}{4}$ of SW $\frac{1}{4}$	8	103	49	29.50	3.245
Peder P. Risvold	South 10 acres of SW $\frac{1}{4}$ of SW $\frac{1}{4}$	8	103	49	9.00	0.99
Anders P. Risvold	N $\frac{1}{2}$ of SE $\frac{1}{4}$ of SW $\frac{1}{4}$	8	103	49	19.50	2.145
Peder P. Risvold	S $\frac{1}{2}$ of SE $\frac{1}{4}$ of SW $\frac{1}{4}$	8	103	49	18.80	2.035
Peder P. Risvold	NE $\frac{1}{4}$ of SE $\frac{1}{4}$	8	103	49	40.00	3.960
Peder P. Risvold	The North 11 acres of that part East of right-of-way of C. M. & St. P. Ry. Co. of NW $\frac{1}{4}$ of SE $\frac{1}{4}$	8	103	49	11.00	1.210
Anders P. Risvold	(Except right-of-way of C. M. & St. P. Ry. Co. and except the N. 11 acres East of such right-of-way) NW $\frac{1}{4}$ of SE $\frac{1}{4}$	8	103	49	25.00	2.750

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Anders P. Risvold (Except right-of-way of C.
M. St. P. Ry Co) SW $\frac{1}{4}$ of SE $\frac{1}{4}$ 8 103 49 35.00 3.850

Lars Paulson, G. P.
Wilson and G. T.
Nyhus SE $\frac{1}{4}$ of SE $\frac{1}{4}$ 8 103 49 39.00 3.861

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit
Sara Vollan	SW $\frac{1}{4}$ of NW $\frac{1}{4}$	9	103	49	8.00	0.968
Sara Vollan	N $\frac{1}{2}$ of SW $\frac{1}{4}$	9	103	49	47.90	4.421
Torger H. Nyhus	SW $\frac{1}{4}$ of SW $\frac{1}{4}$	9	103	49	39.00	3.861
Peder P. Risvold	SE $\frac{1}{4}$ of SW $\frac{1}{4}$	9	103	49	38.00	4.235
Ole Johnson	NW $\frac{1}{4}$ of NE $\frac{1}{4}$	16	103	49	37.10	4.040
Torger H. Nyhus	SW $\frac{1}{4}$ of NE $\frac{1}{4}$	16	103	49	38.00	3.762
Peder Risvold	NE $\frac{1}{4}$ of NW $\frac{1}{4}$	16	103	49	39.00	4.247
John Johnson	NW $\frac{1}{4}$ of NW $\frac{1}{4}$	16	103	49	39.00	3.470
Paul A. Risvold	S $\frac{1}{2}$ of NW $\frac{1}{4}$	16	103	49	78.00	8.151
Gilbert G. Brende	N $\frac{1}{2}$ of SW $\frac{1}{4}$	16	103	49	78.00	8.151
Gilbert G. Brende	SW $\frac{1}{4}$ of SW $\frac{1}{4}$	16	103	49	40.00	4.40
Gilbert G. Brende	SE $\frac{1}{4}$ of SW $\frac{1}{4}$	16	103	49	40.00	3.96
Ole G. Brende	W $\frac{1}{2}$ of SE $\frac{1}{4}$	16	103	49	78.00	7.722
Ole G. Brende	SE $\frac{1}{4}$ of SE $\frac{1}{4}$	16	103	49	4.00	0.484
G. T. Nyhus	NE $\frac{1}{4}$ of NE $\frac{1}{4}$	17	103	49	39.00	4.290
Sara Vellan	(Except right-of-way of C. M. & St. P. Ry Co.) W $\frac{1}{2}$ of NE $\frac{1}{4}$	17	103	49	70.00	7.700
Gilbert G. Brende and O. L. Brende	SE $\frac{1}{4}$ of NE $\frac{1}{4}$	17	103	49	39.00	4.290
Gilbert T. Gunderson	E $\frac{1}{2}$ of N.W $\frac{1}{4}$	17	103	49	77.00	8.470
Peter P. Risvold	N.W $\frac{1}{4}$ of NW $\frac{1}{4}$	17	103	49	37.00	4.070
Gilbert T. Gunderson	SW $\frac{1}{4}$ of NW $\frac{1}{4}$	17	103	49	40.00	4.400
G. T. Nyhus	Tract 1 of SW $\frac{1}{4}$	17	103	49	7.40	1.018
Thomas O. Brende, Thorsten O. Brende, and Joseph O. Brende,	Tract 2 of SW $\frac{1}{4}$	17	103	49	2.18	0.300

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Ingeberg Gunderson
and Gilbert T. Gun-
derson Tract 3 of SW $\frac{1}{4}$ 17 103 49 4.70 0.647

Ingeberg Gunderson and Gilbert T. Gunderson	Tract 4 of SW¼	17	103	49	1.00	0.138
Olaf B. Floren	Tract 5 of SW¼	17	103	49	4.80	0.66
						Proportion of Benefit
Name of Owner	Description	Sec.	Twp.	R	Acres	
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 6 of SW¼	17	103	49	2.04	0.281
Clara Schneider	Tract 7 of SW¼	17	103	49	1.34	0.185
Torger N. Nyhus	Tract 8 of SW¼	17	103	49	3.00	0.413
Sarah Vollan	Tract 9 of SW¼	17	103	49	2.96	0.407
E. G. Brende	Tract 10 of SW¼	17	103	49	3.00	0.413
Iver Paulson	Tract 11 of SW¼	17	103	49	1.03	0.142
E. G. Brende	Tract 12 of SW¼	17	103	49	2.00	0.275
G. T. Gunderson	Tract 13 of SW¼	17	103	49	21.56	2.965
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 14 of SW¼	17	103	49	18.00	2.477
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 15 of SW¼	17	103	49	28.80	3.960
Ingeberg Gunderson and Gilbert T. Gunderson	Tract 16 of SW¼	17	103	49	35.72	3.929
Nidres Norwegian Evangelical Lutheran Congregation	Tract 17 of SW¼	17	103	49	8.60	0.946
Knud Thompson and Jacob Olson	Tract 18 of SW¼	17	103	49	1.83	0.252
Erick H. Oien	NE¼ of SE¼	17	103	49	39.00	4.290
Bortinus Pederson	(Except right-of-way of C. M. & St. P. Ry Co.) W¼ of SE¼	17	103	49	70.65	7.772
Mali Johnson	SE¼ of SE¼	17	103	49	40.00	4.400
John O. Aasen	(Except Tracts 1 and 2) NE¼	18	103	49	126.79	17.709
257						
Peder P. Risvold	Tract 1 of NE¼	18	103	49	10.14	1.115
Ole J. Stordahl	Tract 2 of NE¼	18	103	49	1.40	0.154
Andrew Swenson, Aas	NW¼	18	103	49	51.65	8.523
Ole J. Ustrud	That part East of River of NE¼ of SE¼	18	103	49	11.67	1.805

Martha R. Roberts	NE¼ of NE¼	20	103	49	40.00	4.400
B. G. Flamoe	(Except right-of-way of C. M. & St. P. Ry Co.) NW¼ of NE¼	20	103	49	34.50	3.795
						Proportion of Benefit.
Name of Owner	Description	Sec.	Twp.	R	Acres	
Haagen O. Skatvold	(Except right-of-way of C. M. & St. P. Ry Co.) S½ of NE¼	20	103	49	70.20	9.653
Frederick Johnson and Jens Johnson and Torbjorn Olson	Tract 1 of NW¼	20	103	49	4.28	0.589
Bertha Peterson, Alice C. Thompson, John O. Thompson, Wm. N. Thompson, Fred R. Thompson, Rueben V. Thompson, Mabel J. Thompson and Carl M. Thompson	(Except Tract 1 and except the Tract next Herein-after described) NE¼ of NW¼	20	103	49	10.00	1.375
James J. Flamoe	A tract as described in Book 67 of Deeds, page 106, in NE¼ of NW¼	20	103	49	10.00	1.375
John J. Almie, Jr.	NW¼ of NW¼	20	103	49	3.33	0.456
Bernt J. Flamoe	SE¼ of NW¼	20	103	49	8.10	1.114
Peter Paulson	(Except right-of-way of C. M. & St. P. Ry Co.) E½ of SE¼	20	103	49	63.85	8.752
Haagen O. Skatvold	NW¼ of SE¼	20	103	49	15.00	2.063
Peter Paulson	(Except Tract 1) that part lying East of River of SW¼ of SE¼	20	103	49	13.00	1.788
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G. T. Nyhus	Tract 1 of SE¼	20	103	49	1.60	0.220
Mattha R. Roberta	North ½	21	103	49	251.75	26.687
Peter Paulson	W½ of SW¼	21	103	49	79.0	10.461
Erick G. Brende	E½ of SW¼	21	103	49	79.0	8.690
Erick G. Brende	SE¼	21	103	49	101.42	8.796
Martha Roberts, John H. Roberts and Thomas S. Roberts	E½ of SW¼ of SW¼	27	103	49	2.00	0.242
Erick O. Eggen and D. D. Russell	W½ of SW¼ of SW¼	27	103	49	17.75	1.764
G. T. Nyhus	(Except 5 acres next described) n½ of NE¼	28	103	49	29.75	6.911

E. G. Brende	5 acres being 10 rods N. and S. at East end, and no rods N. and S. at West end, extending across the North side of N $\frac{1}{2}$ of NE $\frac{1}{4}$	28	103	49	3.00	0.363
						Proportion of Benefit.
Name of Owner	Description	Sec.	Twp.	R	Acres	
G. T. Nyhus	S $\frac{1}{2}$ of NE $\frac{1}{4}$	28	103	49	78.00	7.414
O. S. Thompson	(Except the East 19 acres) E $\frac{1}{2}$ of NW $\frac{1}{4}$	28	103	49	60.24	7.449
G. T. Nyhus	East 19 acres of E $\frac{1}{2}$ of NW $\frac{1}{4}$	28	103	49	18.76	2.089
O. S. Thompson	(Except right-of-way of C. M. & St. P. Ry Co.) W $\frac{1}{2}$ of NW $\frac{1}{4}$	28	103	49	73.15	10.077
O. S. Thompson	(Except right-of-way of C. M. & St. P. Ry Co.) N $\frac{1}{2}$ of SW $\frac{1}{4}$	28	103	49	70.90	9.405
O. S. Thompson	E.18 $\frac{1}{2}$ acres of E $\frac{1}{2}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$	28	103	49	17.80	2.452
Ole Peterson	W 1 $\frac{1}{4}$ acres of E $\frac{1}{2}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$	28	103	49	1.70	2.343
Ole Peterson	(Except right-of-way of C. M. & St. P. Ry Co) W $\frac{1}{2}$ of SW $\frac{1}{4}$ of SW $\frac{1}{4}$	28	103	49	12.95	1.837
Thomas S. Roberts	SE $\frac{1}{4}$ of SW $\frac{1}{4}$	28	103	49	39.00	5.225
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G. T. Nyhus	N., 3 $\frac{1}{2}$ acres of N $\frac{1}{2}$ of SE $\frac{1}{4}$	28	103	49	1.50	0.165
Erick O. Eggen	(Except the N 3 $\frac{1}{2}$ acres) N $\frac{1}{2}$ of SE $\frac{1}{4}$	28	103	49	76.50	7.153
Thomas S. Roberts	SW $\frac{1}{4}$ of SE $\frac{1}{4}$	28	103	49	39.00	4.29
Nils E. Eggen	SE $\frac{1}{4}$ of SE $\frac{1}{4}$	28	103	49	39.00	3.861
Bertha Peterson, Alice C. Thompson, John O. Thompson, Wm. H. Thompson, Fred R. Thompson, Reuben V. Thompson, and Carl Thompson	Tract 1 of NE $\frac{1}{4}$	29	103	49	30.00	4.188
Joseph G. Thompson	Tract 2 of NE $\frac{1}{4}$	29	103	49	15.00	2.178
O. S. Thompson	(Except right-of-way of C. M. & St. P. Ry Co.) Tract 3 of NE $\frac{1}{4}$	29	103	49	61.31	9.477
O. S. Thompson	N $\frac{1}{2}$ of SE $\frac{1}{4}$	29	103	49	52.00	7.908
O. S. Thompson	N $\frac{1}{2}$ of SE $\frac{1}{4}$	29	103	49	3.00	0.696

Ole Peterson	SE $\frac{1}{4}$ of SE $\frac{1}{4}$	29	103	49	29.00	4.374
Andrew J. Aasen	N $\frac{1}{2}$ of NE $\frac{1}{4}$	32	103	49	67.20	9.399
Andrew J. Aasen	SW $\frac{1}{4}$ of NE $\frac{1}{4}$	32	103	49	37.00	4.477

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Bertha Peterson, Alice C. Thompson, John O. Thompson, Wm. Thompson, Fred R. Thompson, Mabel Thompson and Carl Thompson	N $\frac{1}{2}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$	32	103	49	19.50	3.159
Joseph C. Thompson	S $\frac{1}{2}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$	32	103	49	19.50	3.159
Andrew J. Aasen	E $\frac{1}{2}$ of NW $\frac{1}{4}$	32	103	49	11.00	1.225
Thomas Hendrickson	E $\frac{1}{2}$ of SW $\frac{1}{4}$	32	103	49	20.00	2.640
James L. Finnegan	N $\frac{1}{2}$ of SE $\frac{1}{4}$	32	103	49	76.00	11.232
John Finnegan	SW $\frac{1}{4}$ of SE $\frac{1}{4}$	32	103	49	36.00	4.752
Margaret L. Finnegan	SE $\frac{1}{4}$ of SE $\frac{1}{4}$	32	103	49	37.20	5.534

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Martha R. Roberts, John H. Roberts and Thomas S. Roberts	NE $\frac{1}{4}$ of NE $\frac{1}{4}$	33	103	49	39.00	3.861
Thomas S. Roberts	NW $\frac{1}{4}$ of NE $\frac{1}{4}$	33	103	49	39.00	4.719
Gurine Peterson	S $\frac{1}{2}$ of NE $\frac{1}{4}$	33	103	49	80.00	8.800
Thomas S. Roberts	NE $\frac{1}{4}$ of NW $\frac{1}{4}$	33	103	49	39.00	5.792
Andrew J. Aasen	(Except right-of-way of C. M. & St. P. Ry. Co) NW $\frac{1}{4}$ of NW $\frac{1}{4}$	33	103	49	32.10	4.631

Bertha Peterson, Alice C. Peterson, John O. Thompson, Wm. H. Thompson, Fred Thompson, Reuben V. Thompson, and Mabel Thompson and Carl Thompson	(Except right-of-way of C. M. & St. P. Ry Co) SW $\frac{1}{4}$ of NW $\frac{1}{4}$	33	103	49	33.00	4.967
Gurine Peterson	SE $\frac{1}{4}$ of SW $\frac{1}{4}$	33	103	49	40.00	5.94
Anne O. Haugen, Amanda E. Haugen and Jennie A. Haugen	E $\frac{1}{2}$ of SW $\frac{1}{4}$	33	103	49	79.00	11.732
Joseph C. Thompson	(Except right-of-way of C. M. & St. P. Ry Co) NW $\frac{1}{4}$ of SW $\frac{1}{4}$	33	103	49	33.00	5.000
Thomas Hendrickson and B. B. Hendrickson	(Except right-of-way of C. M. & St. P. Ry Co.) SW $\frac{1}{4}$ of SW $\frac{1}{4}$	33	103	49	32.10	4.863

Gurine Peterson	N $\frac{1}{2}$ of SE $\frac{1}{4}$	33	103	49	80.00	8.800
Gurine Peterson	SW $\frac{1}{4}$ of SE $\frac{1}{4}$	33	103	49	39.00	4.719

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit
Gurine Peterson	SE $\frac{1}{4}$ of SE $\frac{1}{4}$	33	103	49	39.00	3.861
Martha R. Roberts, John H. Roberts and Thomas S. Roberts	NW $\frac{1}{4}$ of NW $\frac{1}{4}$	34	103	49	20.75	2.061
Gurine Peterson	SW $\frac{1}{4}$ of NW $\frac{1}{4}$	34	103	49	21.00	2.079

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Gurine Peterson	W $\frac{1}{2}$ of SW $\frac{1}{4}$	34	103	49	35.50	3.526
Lars Simonson	SW $\frac{1}{4}$ of SW $\frac{1}{4}$	29	104	49	6.67	0.784
C. R. Mattern	SE $\frac{1}{4}$ of SW $\frac{1}{4}$	29	104	49	12.67	1.394
John Bruaas	(Except right-of-way of C. M. & St. P. Ry Co) S $\frac{1}{2}$ of SE $\frac{1}{4}$	29	104	49	14.00	1.540
Lars Simonson	E $\frac{1}{2}$ of NE $\frac{1}{4}$	31	104	49	37.00	5.088
Hans Nelson	SW $\frac{1}{4}$ of NE $\frac{1}{4}$	31	104	49	20.00	2.888
Lars Simonson	SE $\frac{1}{4}$ of NW $\frac{1}{4}$	31	104	49	11.67	1.926
P. G. Thompson	NE $\frac{1}{4}$ of SW $\frac{1}{4}$	31	104	49	32.85	5.431
Ole L. Mule	S $\frac{1}{2}$ of SW $\frac{1}{4}$	31	104	49	19.60	3.234
P. G. Thompson	SE $\frac{1}{4}$ of SW $\frac{1}{4}$	31	104	49	35.18	5.805
P. M. Thompson	NE $\frac{1}{4}$ of SE $\frac{1}{4}$	31	104	49	39.00	4.978
Julie L. Moe and Julie L. Hustoft	NW $\frac{1}{4}$ of SE $\frac{1}{4}$	31	104	49	39.82	5.476
Oluf N. Lyng	E $\frac{1}{2}$ of SW $\frac{1}{4}$ of SE $\frac{1}{4}$	31	104	49	19.50	2.682
P. G. Thompson	# $\frac{1}{2}$ of SW $\frac{1}{4}$ of SE $\frac{1}{4}$	31	104	49	19.32	2.657
Oluf N. Lyng	SE $\frac{1}{4}$ of SE $\frac{1}{4}$	31	104	49	38.00	4.717
John M. Bruaas	(Except the right-of-way of C. M. & St. P. Ry Co.) N $\frac{1}{2}$ of NE $\frac{1}{4}$	32	104	49	38.00	3.300
Mali P. Langness	(Except right-of-way of C. M. & St. P. Ry Co) S $\frac{1}{2}$ of NE $\frac{1}{4}$	32	104	49	50.00	5.500
Mali P. Langness	E $\frac{1}{2}$ of NW $\frac{1}{4}$	32	104	49	53.00	5.968
Lars Simonson	W $\frac{1}{2}$ of NW $\frac{1}{4}$	32	104	49	53.00	7.013
Mali P. Langness	N $\frac{1}{2}$ of SW $\frac{1}{4}$	32	104	49	78.00	8.580
Randi A. Floren	SW $\frac{1}{4}$ of SW $\frac{1}{4}$	32	104	49	38.00	4.379

Columbia Creamery Co.	A tract as described in Book 59 of Deeds, Page 70, in SE¼ of SW¼	32	104	49	.11	0.012
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Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Mrs. M. O. Nyhus	(Except the Tract last above described) SE¼ of SW¼	32	104	49	36.00	3.960
Mali P. Langness	(Except right-of-way of C. M. & St. P. Ry Co) N.W¼ of SE¼	32	104	49	1.73	0.120
A. J. Pettingill	The West 500 ft. of Tract 9 of SE¼	32	104	49	1.73	0.190
A. J. Pettingill	(Except that part in St. Oluf Mill Tract as shown in Book 5 of Plats, page 63) Tract 3 of SE¼	32	104	49	7.29	0.802
Wm. J. Milne	That St. Oluf Mill Tract as described in Book 5 of Plats, page 63, being part of Tracts 2, 3, and 9 of SE¼	32	104	49	4.37	.4607

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
C. L. Ferguson	SW¼ of NE¼	24	101	50	32.32	3.555
C. L. Ferguson	SE¼ of NE¼	24	101	50	38.50	4.235
John Johnson	SE¼ of NW¼	24	101	50	12.64	1.390
Chas. L. Ferguson	SE¼ of NW¼	24	101	50	12.64	1.320
Ed Clark	NE¼ of SW¼	24	101	50	5.80	0.583
M. L. Fusselman	SE¼ of SW¼	24	101	50	3.31	0.364
Geo. Parsons	NW¼ of NE¼	25	101	50	40.00	4.400
Geo. Parsons	NW¼ of NE¼	25	101	50	40.00	4.400
Harry A. Chetham	SW¼ of NE¼	25	101	50	40.00	4.400
Harry A. Chetham	SE¼ of NE¼	25	101	50	40.00	4.400
Geo. A. Parsons	NE¼ of NW¼	25	101	50	12.64	1.390
Harry A. Chetham	SE¼ of NW¼	25	101	50	12.30	1.353
Harry A. Chetham	NE¼ of SE¼	25	101	50	40.00	4.400

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Harry A. Chetham	NW¼ of SE¼	25	101	50	40.00	4.400
Harry A. Chetham	W¼ of SW¼ of SE¼	25	101	50	20.00	2.200
Harry A. Chetham	SE¼ of SE¼	25	101	50	40.00	4.400

Johnson Bros. Land Co.	E½ of SW¼ of SE¼	25	101	50	20.00	2.200
Harry A. Chetham	NE¼ of SW¼	25	101	50	16.78	1.845
G. A. Castle	SE¼ of SW¼	25	101	50	8.23	0.905
Ludwig Seubert	NE¼ of NE¼	36	101	50	40.00	4.400
Ludwig Seubert	NW¼ of NE¼	36	101	50	36.47	4.011
Dennis & Dennis	SE¼ of NE¼	36	101	50	27.54	3.029
John DeBok	NW¼ of SW¼	31	101	49	30.05	3.305
Wm. H. Lyon	SW¼ of SW¼	31	101	49	4.86	0.534
John DeBok	SW¼ of NW¼	31	101	49	40.00	4.400
John DeBok	NW¼ of NW¼	31	101	49	38.23	4.205
Roger L. Dennis	Tract 1	31	101	49	6.63	0.729
Roger L. Dennis	Tract 2	31	101	49	2.03	0.223
Roger L. Dennis	Tract 3	31	101	49	13.31	1.467
Roger L. Dennis	Tract 4	31	101	49	15.54	1.709
Roger L. Dennis	Tract 5	31	101	49	30.47	3.351

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit.
Roger L. Dennis	Tract 6	31	101	49	5.13	0.564
Roger L. Dennis	Tract 7	31	101	49	4.76	0.523
Roger L. Dennis	Tract 8	31	101	49	10.34	1.137
Roger L. Dennis	Tract 12	31	101	49	9.83	1.081
Roger L. Dennis	Tract 13	31	101	49	13.29	1.461
Roger L. Dennis	Tract 14	31	101	49	25.13	2.764
Roger L. Dennis	Tract 15	31	101	49	9.81	1.079
Roger L. Dennis	Tract 16	31	101	49	8.30	0.931
Roger L. Dennis	Tract 17	31	101	49	21.80	2.398
Roger L. Dennis	Tract 18	31	101	49	2.50	0.275
Roger L. Dennis	Tract 19	31	101	49	13.08	1.438
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Roger L. Dennis	Tract 20	31	101	49	17.03	1.873
Roger L. Dennis	Tract 21	31	101	49	12.03	1.323
Roger L. Dennis	Tract 22	31	101	49	10.02	1.102
Geo. Henderson	S½ of SW¼ of SW¼	32	101	49	16.80	1.848
Thos. Quigley	NW¼ of SW¼ and N½ of SW¼ of SW¼	32	101	49	36.76	2.573

Frank Corey and F. A. Ayers—	S½ of SE¼ of SW¼	32	101	49	12.40	1.364
Joe Seubert	N½ of SE¼ of SW¼ and NE¼ of SW¼	32	101	49	45.30	3.171
Pauline Zetlitz	Except Plat of Hazelville, SE¼	32	101	49	72.05	6.484
Norman O. Hamlin	Lot 2 of S½ of NE¼	32	101	49	28.00	2.520
Norman O. Hamlin	Lot 3 of S½ of NE¼	32	101	49	2.65	0.291
Arne Zetlitz	Lot 4 of S½ of NE¼	32	101	49	7.20	0.504
Wm. Jones	Lots 1, 2, 3 and 4 of Plat of Hazelville, SE¼	32	101	49	3.70	0.407
J. Walkins and C. S. McDonald	Lot 28 of Walkins & Mc- Donald's Plat of W½ of NW¼	33	101	49	23.10	2.541
J. Walkins and C. S. McDonald	Lot 27 of Walkins & Mc- Donald's Plat of W½ of NW¼	33	101	49	17.00	1.870
Chas. Eckert	E½ of NW¼	33	101	49	49.74	5.471

Name of Owner	Description	Sec.	Twp.	R	Acres	Proportion of Benefit
Oscar Harpel	NW¼ of SW¼	33	101	49	17.35	1.388
G. B. Tuthill	All lying South of River in NE¼	33	101	49	16.22	1.784

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Julius Kuh	All lying North of River in NE¼	33	101	49	70.50	7.755
A. W. Tuthill	N½ of NW¼	34	101	49	24.36	2.679
Chas. Eckert	SW¼ of SW¼	27	101	49	15.58	1.713
Chas. Eckert	SE¼ of SW¼	27	101	49	24.60	2.904
Clark Coats Estate	NE¼ of SW¼	27	101	49	30.30	3.333
Clark Coats Estate	NW¼ of SE¼	27	101	49	20.90	2.299
Clark Coats Estate	SE¼ of NW¼	27	101	49	10.55	1.160
Clark Coats Estate	SW¼ of NE¼	27	101	49	27.63	3.039
Clark Coats Estate	NW¼ of NE¼	27	101	49	14.17	1.558
Clark Coats Estate	SW¼ of SE¼	22	101	49	28.58	3.143
Clark Coats Estate	NW¼ of SE¼	22	101	49	21.50	2.365
Clark Coats Estate	NE¼ of SW¼	22	101	49	8.50	0.935

Name of Owner	Description	Lot	Block	Proportion of Benefit
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Town of Renner

Leonard Renner	Lots 1, 2, 3, 4, 5, 6, 7 and	8		0.094
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Olson's Addition to Renner

Jonas Olson		1		0.012
H. W. Ross Lumber Co.	Lots 2, 3, and	4		0.033
Jonas Olson	Lots 5 to 13, inclusive			0.101
H. W. Ross Lumber Co.	Lots 14, 15, 16, 17, 18 and	19		0.062
Jonas Olson	Lots 20, 21, 22, 23 and	24		0.051

Berwick Addition to Sioux Falls.

Grant Lines	Lot 1 and	2	1	0.05
Grant Lines		3	1	0.025
Grant Lines		4	1	0.025
Grant Lines	Lots 5 and	6	1	0.05
Grant Lines	Lots 7, 8, 9, 10, 11 and	12	1	0.15

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Security Savings Bank	Lots 1, 2, 3 and	4	2	0.10
Security Savings Bank	Lots 5, 6, 7, 8, 9, 10, 11 and	12	2	0.20
Frank C. Frizzell	Lots 1 and	2	3	0.05
E. N. Frizzell	Lots 3, 4, 5 and	6	3	0.10
Grant Lines	Lots 7 and	8	3	0.05
E. N. Frizzell	Lots 9 and	10	3	0.05
F. C. Frizzell	Lots 11 and	12	3	0.05
A. D. Horton			4	0.20
Elwin N. Potter			5	0.225
Security Savings Bank			6	0.083
F. L. Blackman	Lots 1 and	2	7	0.05
F. L. Blackman	Lots 7 and	8	7	0.05
F. L. Blackman	Lots 11 and	12	7	0.05
F. C. Frizzell	Lots 1, 2, 3 and	4	8	0.10
J. N. Weston	Lots 7 and	8	8	0.05

Name of Owner	Description	Lot	Block	Proportion of Benefit
F. C. Frizzell	Lots 9 and	10	8	0.05
F. E. Payne		11	8	0.025
Security Savings Bank	Lots 1, 2, 3, 4, 5 and	6	9	0.15

Mathias Blumer		7	9	0.025
Security Savings Bank		8	9	0.025
Security Savings Bank	Lots 9, 10, 11 and	12	9	0.10
J. N. Weston	Lots 1 and	2	10	0.10
J. N. Weston	Lots 10, 11 and	12	10	0.075
State of South Dakota	East Half of		11	0.041
State of South Dakota	Lots 1, 2, 3, 4, 5, 6, 7, 8 and	9	12	0.225
State of South Dakota	Lots 10, 11 and	12	12	0.075
State of South Dakota	Lots 1, 2, 3, 4, 5 and	6	13	0.113
Elwin N. Potter	Lots 7, 8, 9, 10, 11 and	12	13	0.15
State of South Dakota			14	0.175
Security Savings Bank			15	0.30

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Grant Lines	Lots 1 and	2	16	0.05
Grant Lines		3	16	0.025
Grant Lines		4	16	0.025
Grant Lines		5	16	0.025
Grant Lines		6	16	0.025
Grant Lines	Lots 7, 8, 9, 10, 11 and	12	16	0.15
W. C. Archer	Lots 1 and	2	17	0.05
Security Savings Bank	Lots 3 and	4	17	0.05
Dorothy Golden	Lots 5 and	6	17	0.025
Dorothy Golden	Lots 7, 8, 9 and	10	7	0.05
W. C. Archer	Lots 11 and	12	17	0.025
Sophia Krull	Lots 1, 2 and	3	18	0.037
Sophia Krull		4	18	0.12
Sophia Krull	Lots 5 and	6	18	0.12
Sophia Krull	Lots 10 and	11	18	0.024
C. L. Norton		12	18	0.12

Name of Owner	Description	Lot	Block	Proportion of Benefit.
State of South Dakota			19	0.20
State of South Dakota			20	0.31
State of South Dakota	Lots 1, 2 and 3	4	21	0.105
State of South Dakota	Lots 7, 8, 9, 10, 11 and	12	21	0.15
State of South Dakota			22	0.041
Security Savings Bank	Lots 1, 2 and	3	24	0.075

Security Savings Bank		4	24	0.025
J. C. Boynton		5	24	0.025
L. J. Modde		6	24	0.025
M. W. Potter	Lots 7 and	8	24	0.05
Elwin N. Potter		9	24	0.025
Elwin N. Potter	Lots 10, 11 and	12	24	0.075
E. B. Mallet			25	0.02
State of South Dakota			27	0.033
State of South Dakota	Lots 1, 2 and	3	28	0.075

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State of South Dakota	Lots 4, 5, 6, 7 and	8	28	0.125
State of South Dakota			29	0.02
State of South Dakota			30	0.02
Security Savings Bank		2	31	0.012
Jas. Kennedy		3	31	0.025
Security Savings Bank		4	31	0.025
Security Savings Bank	Lots 5 and	6	31	0.05
Security Savings Bank	Lots 7 and	8	31	0.05

Brookings' Addition to Sioux Falls.

Wigant Ludewig	Lots 4, 5, 6, 7, 8, 9, 10, 12 and 13	5		0.325
Hans C. Ruvald	Lots 1, 2 and	3	11	0.075
Hans Ruvald	Lots 1 and	2	12	0.065
H. Ruvald	Lots 3, 4 and	5	12	0.015
Hans C. Ruvald		6	12	0.032

Brooks' Addition to Sioux Falls.

Grant Lines	Lots 14, 15, 16 and	17	1	0.075
Name of Owner	Description	Lot	Block	Proportion of Benefit

Bunker's Addition to Sioux Falls.

Hans Ruvald	Lots 1, 2, 3, 4, 5, 6 and	7	1	0.162
N. S. Johnson		8	1	0.02
Geo. C. Hull		9	1	0.02
Hans Ruvald	Lots 10, 11, 12, 13 and	14	1	0.10
Hans Ruvald		15	1	0.02
Hans Ruvald	Lots 16 and	17	1	0.04
Hans Ruvald	Lots 18, 19 and	20	1	0.06

Hans Ruvald		1	2	0.02
Hans Ruvald	Lots 2, 3, 4, 5, 6 and	7	2	0.06
Joseph Elott	Lots 8 and	9	2	0.02
Hans Ruvald		10	2	0.02
Hans Ruvald		11	2	0.02
O. C. Cadwell		12	2	0.02

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Hans Ruvald	Lots 13, 14, 15, 16, 17, 18, 19 and 20		2	0.15
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Central Park Addition to Sioux Falls.

Chas. Dailey	Lots 1 and	2	1	0.04
Hans Ruvald	Lots 3 and	4	1	0.04
J. H. Fernyhough		5	1	0.02
F. T. Williams		6	1	0.02
Bessie Haas	Lots 7 and	8	1	0.04
J. H. Fernyhough	Lots 9 and	10	1	0.04
Benjamin F. Barnes	Lots 11, 12 and	13	1	0.06
J. H. Fernyhough	Lots 14, 15 and	16	1	0.06
John P. Shoemaker			2	0.30
Frances G. Carpenter			3	0.30
Henry D. Norris			4	0.30
Diantha A. Hurd			5	0.30
Henrietta Levinger			8	0.30
Diantha A. Hurd			12	0.30
Mariette Blomiley			13	0.30

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Frances G. Carpenter			14	0.30
Clara L. Hambright	Lots 1, 2, 3 and	4	15	0.08
Abe Davison and Sippie Davison	Lots 5, 6, 7 and	8	15	0.08
Michael Marousek	Lots 9, 10, 11 and	12	15	0.08
Clara L. Hambright	Lots 13, 14, 15 and	16	15	0.08
Frances G. Carpenter			16	0.30
Frances G. Carpenter			17	0.30
Anne E. Ploog			18	0.30
Frances G. Carpenter			19	0.30

Frances G. Carpenter and G. T. Greeley	Lots 1, 2, 3 and	4	20	0.08
Nora Connell	Lots 5, 6, and 7 and	8	20	0.08
F. G. Carpenter and G. T. Greeley	Lots 9, 10, 11, 12, 13, 14, 15 and 16		20	0.16

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W. R. Timpe and H. L. Schroeder	Lots 1, 2 and	3	21	0.06
F. L. Blackman		4	21	0.02
Mattie M. Hanson	Lots 5, 6, 7 and	8	21	0.08
F. L. Blackman	Lots 9 and	10	21	0.04
F. L. Blackman		11	21	0.02
F. L. Blackman		12	21	0.02
D. J. Carpenter		13	21	0.02
W. R. Timpe and H. L. Schroeder	Lots 14, 15 and	16	21	0.06
Mary C. Brace			30	0.30
F. L. Blackman			31	0.30
Frances G. Carpenter	Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and	14	32	0.28
May Sanders and May B. Sanders	Lots 15 and	16	32	0.04
Earl H. Roster			33	0.30
Frances G. Carpenter			40	0.30
Frances G. Carpenter			48	0.30
George H. Brace			49	0.30

Name of Owner	Description	Lot	Block	Proportion of Benefit.
A. Gale, C. A. Greeley, C. C. Carpenter, and G. H. Brace	Outlet "A"			0.075
Geo. H. Brace and James Jameson, Trus- tees,	Outlet "B"			0.075
Geo. H. Brace and James Jameson, Trustees	Outlet "C"			0.075

Englewood Addition to Sioux Falls.

Marcus Russell	1	0.225
William Fuller	2	0.225
Marcus Russell	3	0.225

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Annie A. W. Nock	4	0.225
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James B. Adams			12	0.225
Marcus Russell			13	0.225
Mark M. Powers			14	0.225
Marcus Russell			15	0.225
Marcus Russell			16	0.225
Marcus Russell			17	0.225
James B. Adams			18	0.225
F. I. Russell		1	19	0.015
F. I. Russell		2	19	0.015
M. T. Botsford	Lots 3 and	4	19	0.03
Addie B. Woodsworth	Lots 5, 6, 7 and	8	19	0.06
Marcus Russell	Lots 9, 10 and	11	19	0.045
Sarah Walker		12	19	0.015
Alice M. Steinbach		13	19	0.015
Lillie M. Darrow	Lots 14, 15 and	16	19	0.045
F. L. Blackman	Lots 1, 2, 3 and	4	20	0.06
F. I. Russell		5	20	0.015
Marcus Russell		6	20	0.015
F. I. Russell	Lots 7 and	8	20	0.03
Marcus Russell	Lots 9, 10, 11, 12, 13, 14, 15 and	16	20	0.12
F. I. Russell		1	21	0.015
Name of Owner	Description	Lot	Block	Proportion of Benefit.
S. D. Kennedy	Lots 2, 3, 4 and	5	21	0.06
F. I. Russell		6	21	0.015
M. J. Tinkham	Lots 7 and	8	21	0.03
F. I. Russell	Lots 9, 10, 11, 12, 13 14, 15 and 16		21	0.12
Marcus Russell			22	0.225
Marcus Russell			27	0.225
Marcus Russell			28	0.225
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Marcus Russell			29	0.225
Edward A. Benson and Charles E. Anderton,			30	0.225
Marcus Russell			31	0.225
Marcus Russell	Lots 1, 2, 3 and	4	32	0.06
F. I. Russell	Lots 5 and	6	32	0.03

James Martin	Lots 7 and	8	32	0.03
E. T. Newhall	Lots 9, 10 and	11	32	0.045
Joe Kirby		12	32	0.015
Marcus Russell	Lots 13, 14, 15 and	16	32	0.06

Harrison Addition to Sioux Falls.

A. P. Burtch	Lots 5, 6 and	7	16	0.075
Porter P. Peck			17	0.225
Porter P. Peck			18	0.225
O. C. Potter	Lots 1, 2 and	3	19	0.06
Oscar C. Potter	Lots 4, 5, 6, 7, 8, 9, 10, 11 and 12		19	0.18
Lester D. Sharon			20	0.225
G. H. Grebel			21	0.225
G. H. Grebel	Lots, 2, 3, 4, 5, 6, 7 and	8	22	0.14
W. L. Oaks			25	0.225
G. H. Grebel			26	0.225
G. H. Grebel			27	0.225
G. H. Grebel			28	0.225
G. H. Grebel			29	0.225

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Oscar C. Potter			30	0.225
Porter P. Peck			31	0.225
Porter P. Peck			32	0.225

273 Lincoln Park Addition to Sioux Falls.

P. P. Peck	Lots 1 and	2	3	0.20
P. P. Peck	Lots 3 and	4	3	0.20
P. P. Peck	Lots 5 and	6	3	0.20

McClellan's Second Addition to West Sioux Falls.

John McClellan Estate	Lots 1, 2, 3, 4, 5, 6, 7, 8, and	9	29	0.27
G. T. Blackman, Administrator of John McClellan Estate	Lots 17 and	18	29	0.06
M. O. Thompson Estate	Lots 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and	14	30	0.275
M. O. Thompson Estate		15	30	0.006

Meredith's First Addition to Sioux Falls.

F. L. Blackman			1	0.225
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Herbert C. Everson and Hattie A. Everson		4	0.225
Chas. A. Scott	Lots 1, 2 and	3 8	0.06
R. E. Bach and Fred Diver	Lots 4, 5, and	6 8	0.06
Sam Smith		7 8	0.02
J. H. Ferryhough	Lots 8 and	9 8	0.04
R. E. Bach and Fred Diver	Lots 10, 11 and	12 8	0.06
Melvin J. Brooks		9	0.225
S. J. Stoneall		16	0.225
Mariette Blomiley		17	0.225
Soren Monson		18	0.225
Soren Monson		23	0.225
Marion Chase		24	0.225
Thos. Scanlon		25	0.225
Thos. Scanlon		26	0.225
W. H. Lyon		31	0.225

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Name of Owner	Description	Lot	Block	Proportion of Benefit.
Thos. Scanlon	Lots 1, 2, 3, 4, 5 and	6	32	0.12
Thos. Scanlon	Lots 7, 8, 9, 10, 11 and	12	32	0.12

Meredith's Second Addition to Sioux Falls.

E. J. Sharon		33	0.225
E. J. Sharon		34	0.18
Horatio A. Burtch		37	0.14
A. G. Erskine		38	0.225
A. G. Erskine	Lots 1, 2 and	3 39	0.06
A. G. Erskine	Lots 4, 5, 6, 7, 8 and	9 39	0.12
A. G. Erskine	Lots 10, 11 and	12 39	0.065
John E. Batheal		40	0.225
A. G. Erskine		43	0.225
Horatio A. Burtch		44	0.225
F. L. Blackman and E. J. Sharon		45	0.14
F. L. Blackman and E. J. Sharon		46	0.14

F. L. Blackman and E. J. Sharon		47	0.225
Horatio A. Burtch		48	0.115
W. H. Lyon		56	0.075
F. L. Blackman and E. J. Sharon		57	0.20
F. L. Blackman and E. J. Sharon		58	0.18
I. E. Kosier		59	0.06
Carrie Lundell		60	0.115
I. E. Kosier		74	0.18
E. R. Loucks	Lots 1 and	2 75	0.035
I. E. Kosier	Lots 4, 5, 6, 7, 8, 9, 10, 11 and 12	75	0.165

275 Millard Park Addition to Sioux Falls.

Porter P. Peck		1	0.135
Porter P. Peck	Lots 10, 11 and	12 34	0.035

North Boulevard Addition to Sioux Falls.

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Geo. H. Brace			4	0.225
Mary C. Brace			6	0.225
Mary C. Brace			9	0.225
Mary C. Brace			13	0.225
Mary C. Brace			29	0.225
Geo. H. Brace			34	0.225
Chas. Brigham, John C. Spofford and Geo. H. Brace			35	0.225
Mary C. Brace			49	0.225
Mary C. Brace			50	0.225
Mary C. Brace			61	0.225

North Park Addition to Sioux Falls.

Lilly E. Braley	Lots 1 and	2	1	0.04
James A. Guest	Lots 3, 4, 5 and	6	1	0.08
Hans Ruvald	Lots 7 and	8	1	0.04
Hans Ruvald	Lots 9 and	10	1	0.04
Hans Ruvald	Lots 1, 2, 3, 4, 5, 6 and	7	2	0.14
Hans Ruvald		8	2	0.02
John Kadinger	Lots 9, 10, 11 and	12	2	0.06

Hans Ruvald		13	2	0.02
Hans Ruvald	Lots 14, 15 and	16	2	0.06
Hans Ruvald		1	3	0.02
Hans Ruvald		2	3	0.02
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Hans Ruvald		3	3	0.02
Hans Ruvald	Lots 4, 5, and	6	3	0.06
H. Ruvald	Lots 7, 8 and	9	3	0.06
H. Ruvald		10	3	0.02
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	3	0.12
H. Ruvald			4	0.30
Emma J. Nelson	Lots 1 and	2	5	0.04
Name of Owner.	Description	Lot	Block	Proportion of Benefit.
Emma J. Nelson	Lots 3, 4, 5, 6, 7 and	8	5	0.12
Emma J. Nelson	Lots 9, 10, 11, 12, 13, 14, 15 and	16	5	0.16
Hans Ruvald	Lots 1, 2, 3, 4 and	5	6	0.10
John Frederickson, Peter Helland and Hans Ruvald		6	6	0.02
Hans Ruvald	Lots 7 and	8	6	0.04
Hans Ruvald	Lots 9 and	10	6	0.08
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	6	0.16
Henry Teimeier	Lots 1 and North Half of	2	7	0.03
F. W. Pieper	Lots 3 and South half of	2	7	0.03
F. W. Pieper	Lots 4 and	5	7	0.04
F. W. Pieper		6	7	0.02
F. W. Pieper	Lots 7 and	8	7	0.04
E. C. Lord		9	7	0.02
H. Ruvald	Lots 10 and	11	7	0.04
Hans Ruvald	Lots 12, 13, 14, 15 and	16	7	0.10
Hans Ruvald	Lots 1 and	2	8	0.04
Hans Ruvald	Lots 3, 4 and	5	8	0.06
H. Ruvald	Lots 6 and North Half of	7	8	0.03
277				
Hans Ruvald	Lots 8 and South Half of	7	8	0.03
Lena H. Bessler		1	10	0.02

F. H. Bessler		2	10	0.02
P. B. Hunt	Lots 3, 4 and	5	10	0.06
J. M. Warren	Lots 10, 11 and South Half of	12	10	0.05
Lena Bessler	Lots 13 and North Half of	12	10	0.03
Hans Ruvald	Lots 1 and	2	11	0.04
Louise Guest Estate	Lots 3 and	4	11	0.04
Hans Ruvald	Lots 5, 6 and	7	11	0.06
H. Ruvald		8	11	0.02
Peter P. Simson	Lots 1 and	2	12	0.04
Hans Ruvald		3	12	0.02
Name of Owner	Description	Lot	Block	Proportion of Benefit
H. Ruvald		4	12	0.04
Hans Ruvald	Lots 5, 6, and	7	12	0.06
H. Ruvald		8	12	0.02

North Park Second Addition to Sioux Falls.

Julia W. Anderson		1	0.30
Hans Ruvald		2	0.30
Hans Ruvald		3	0.40
Ira Cox		4	0.30
Hans Ruvald		5	0.30
Hans Ruvald		6	0.30
Theron S. Swain and Henry E. Shaw		7	0.30
Hans Ruvald		8	0.30
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Hans Ruvald		9	0.30
Hans Ruvald		10	0.30
Ira Cox		11	0.30
Julia W. Anderson	Lots 1 to 16, inclusive	12	0.30
Hans Ruvald	Lots 17 and	18	0.05
Julia W. Anderson	Lots 19, 20, 21, 22, 23 and 24	12	0.15
Hans Ruvald		13	0.30
Dan Hamway	Lots 1, 2 and	3	0.063
Thomas E. Powers	Lots 4, 5, 6, 7, 8, 9, 10, 11, 12 and	13	0.275
Dan Hamway	Lots 14, 15 and	16	0.063
Hans Ruvald		15	0.40

Geo. J. Fullerton	Lots 1 and	2	16	0.05
S. Olney		3	16	0.02
S. Olney		4	16	0.02
S. Olney		5	16	0.02
H. Ruvald		6	16	0.02
H. Ruvald	Lots 7 and	8	16	0.04
Edward H. Story		9	16	0.02
Name of Owner	Description	Lot	Block	Proportion of Benefit.
Hans Ruvald		10	16	0.02
Hans Ruvald		11	16	0.02
Hans Ruvald		12	16	0.02
Hans Ruvald		13	16	0.02
W. W. Ormiston		14	16	0.02
Hans Ruvald		15	16	0.02
Hans Ruvald		16	16	0.02
Hans Ruvald	Lots 1 and	2	17	0.04
Hans Ruvald	Lots 3, 4, 5, 6, 7 and	8	17	0.12
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Hans Ruvald	Lots 9 and	10	17	0.04
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	17	0.12
H. Ruvald	Lots 1 and	2	18	0.04
Hans Ruvald		3	18	0.02
Hans Ruvald		4	18	0.02
Hans Ruvald	Lots 5 and	6	18	0.04
S. E. White		7	18	0.02
Hans Ruvald	Lots 8, 9, 10, 11, 12 and	13	18	0.12
Hans Ruvald	Lots 14, 15 and	16	18	0.06
Hans Ruvald			20	0.30
H. Ruvald	Lots 1, 2 and	3	21	0.06
H. Ruvald		4	21	0.02
H. Ruvald		5	21	0.02
H. Ruvald		6	21	0.02
H. Ruvald	Lots 7 and	8	21	0.04
Hans Ruvald	Lots 9, 10, 11, 12, 13, 14, 15 and	16	21	0.16
Hans Ruvald	Lots ., 2, 3, 4, 5 and	6	22	0.12
H. Ruvald		7	22	0.02

Hans Ruvald		8	22	0.02
H. Ruvald	Lots 9 and	10	22	0.04
Hans Ruvald	Lots 11, 12, 13, 14, 15 and	16	22	0.12
Name of Owner	Description	Lot	Block	Proportion of Benefit
Hans Ruvald			23	0.30
Wigant Ludewig			24	0.45

Sioux Falls Improvement Co's Addition to Sioux Falls.

S. E. Reinius			89	0.20
Soo Valley Granite Co.	Lots 1, 2, 3, and	4	91	0.046
Sarah Foster	Lots 12, 13 and	14	91	0.025
J. Reichard and J. W. Richard	Lots 15 and	16	91	0.02

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Moses Hawkins		17	91	0.012
James W. Bowles		18	91	0.012

Summit Addition to Sioux Falls.

Harry J. Brown		1	17	0.025
Soo Valley Investment & Construction Co.		2	17	0.025
Anna Hillner	Lots 23, 24, 25 and	26	17	0.10
F. L. Blackman		1	18	0.025
Margaret M. Matthews and Hannah L. Matthews		2	18	0.025
Alex Matthews		3	18	0.025
Bertha M. Ferguson		4	18	0.025
F. L. Blackman	Lots 5, 6 and	7	18	0.025
J. B. Fearon		8	18	0.025
J. H. Fernyhough		9	18	0.025
F. L. Blackman	Lots 16, 17, 18 and	19	18	0.10
A. W. Ibach		20	18	0.025
F. L. Blackman	Lots 21, 22, 23, 24, 25 and	26	18	0.15

West Park Addition to Sioux Falls.

David R. Rector	Lots 1 and	2	1	0.05
Augusta C. Fowler	Lots 14 and	15	1	0.05
Sioux Falls Trust Co.		16	1	0.025
Sioux Falls Trust Co.	Lots 17, 18, 19 and	20	1	0.10

Sioux Falls Trust Co.	Lots 1, 2, 3, and	4	2	0.075
Name of Owner	Description	Lot	Block	Proportion of Benefit.
Sioux Falls Trust Co.	Lots 5, 6 and	7	2	0.075
Sioux Falls Trust Co.		8	2	0.025
Sioux Falls Trust Co.	Lots 9, 10, 11, 12 and	13	2	0.125
Sioux Falls Trust Co.		14	2	0.025

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Board of Education of the City of Sioux Falls	Lots 15, 16, 17 and	18	2	0.075
Sioux Falls Trust Co.	Lots 19 and	20	2	0.025
Sioux Falls Trust Co.	Lots 13 and	14	3	0.05
Sioux Falls Trust Co.	Lots 15 and	16	3	0.05

J. L. Phillips Addition to Sioux Falls.

Manchester Biscuit Co.	Lots 1, 2, 3, and	4	25	0.833
Chicago, Milwaukee & St. Paul Ry Co.,	Lots 5, 6, 7, 8 and	9	25	2.291
Chicago, Milwaukee & St. Paul Ry. Co.	Lots 10, 11, 12, 13, 14, 15, 16, 17 and	18	24	3.094
Geo. B. Cone	Lots 1 and	2	24	0.480
F. M. Mills		3	24	0.229
W. I. Thompson and J. W. Wadden		4	24	0.229
Madison Mill & Grain Co.		5	24	0.229
W. I. Thompson		6	24	0.229
Rock Island Plow Co.	Lot 7 and North Half of	8	24	0.343
Luella A. Jones	Lot 9 and South Half of	8	24	0.343
W. K. Van Brunt	Lots 1, 2 and North Half of	3	23	0.859
Van Brunt-Overland Co.	South Half of Lot 3 and North Half of	4	23	0.480
Geo. H. Brace	South Half of Lot 4, and Lots 5 and	6	23	1.145
J. N. Weston		7	23	0.572
German Savings Bank		8	23	0.687
Joe Tosini	North Half of	9	23	0.480
Carl Lock	South Half of	9	23	0.572
G. Kiriakedes		1	22	1.145
Isaer Van Eps		2	22	1.145

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Name of Owner	Description	Lot	Block	Proportion of Benefit
Lacotah Building Co.	Lot 3 and north half of	4	22	1.719
Frank Angel	South half of	4	22	0.572
Inez C. Van Eps		5	22	1.145
Mary Zentel		6	22	1.145
E. B. Northrup		7	22	1.145
R. F. Pettigrew		8	22	1.145
M. C. Smith		9	22	1.145
H. A. Homan	Lot 17 and North Half of	16	21	6.874
E. L. Smith	Lot 15 and South half of	16	21	1.489
L. A. Kelley	Lots 13 and	14	21	1.375
J. W. Jones		12	21	0.480
W. Braley and Geo T. Blackman	West 100 ft. of Lots 10 and	11	21	0.480
J. W. Jones	East 50 feet of lots 10 and	11	21	0.229
J. P. Edmison	Undivided $\frac{1}{2}$ lots 4, 5 and	6	26	3.437
E. L. Smith	Undivided $\frac{1}{2}$ lots 4, 5, and	6	26	3.437
Chicago, Rock Island & Pacific Ry Co.	West 44 feet of Lots 7, 8 and	9	26	0.412
H. T. Parmley	East 42 feet of West 86 Feet of Lots 7, 8, and	9	26	0.412
Pete Ellingson and John Ellingson	East 42 Feet of West 128 Feet of Lots 7, 8 and	9	26	0.412
P. Ellingson	East 22 feet of lots 7, 8, and	9	26	0.229
Koenig Realty Co.	Lots 10, 11 and	12	15	0.685
G. T. Greeley	North Half of Lot	13	15	0.115
Josephine Levinger	South Half of Lot	13	15	0.115
E. J. Daniels		14	15	0.229

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C. C. Bratrud		15	15	0.229
G. T. Bratrud	North Half of	16	15	0.115
F. Hyde	South Half of	16	15	0.115
Inez C. Van Eps	Lots 17 and	18	15	0.480
Name of Owner	Description	Lot	Block	Proportion of Benefit
Chas. Look and W. H. Look	Lot 10 and South Half of	11	14	0.944
John Tossini	North Half of	11	14	0.115

Wm. Reynolds		12	14	0.229
John McKee	Lot 13 and South Half of	14	14	0.344
G. H. Perry Estate	North Half of Lot 14 and lot	15	14	0.344
Chas. S. Lund		16	14	0.229
Wm. Tate	South Half of	17	14	0.115
G. L. Nadel	North Half of	17	14	0.115
Beach Parshall Realty Co.		18	14	0.229
Robert R. Plane		10	13	0.229
L. Koplow	Lot 11 and South half of	12	13	0.344
W. I. Thompson	North Half of Lot 12 and South 117 Feet of	13	13	0.688
F. J. Solari and S. J. Solari	North 33 Feet of	13	13	0.688
F. J. Solari and S. J. Solari		14	13	0.229
Pat Shannon	South Half of	15	13	0.115
A. M. Whitman	North Half of	15	13	0.115
Geo. W. Egan	South Half of	16	13	0.115
C. O. Bailey	North Half of	16	13	0.115
Albert Anderson		17	13	0.229
Victor Anderson and Albert Anderson		18	13	0.229

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F. S. Emmerson Estate		1	21	0.344
Chas. Kaufmann	North Half of	2	21	0.172
G. T. Greeley	South Half of	2	21	0.172
E. L. Smith	North Half of	3	21	0.172
E. L. Smith	South Half of Lots 3 and Lot	4	21	0.515
E. B. Northrup		5	21	0.229
Will A. Beach	North Half of	6	21	0.114
A. K. Pay	South Half of	6	21	0.114

Name of Owner	Description	Lot	Block	Proportion of Benefit.
G. T. Greeley		6	21	0.229
S. K. Grigsby	South Half of	9	21	0.114
Wm. Carswell	North Half of	9	21	0.114

Burlington's Sub-Division of Lots 10 to 13.
Block 26 of J. L. Phillips' Addition.

A. H. Stites	Lots 1, 2 and	3	26	2.750
Farley & Denton Co.		4	26	0.916
Brown Drug Co.	Lots 5, 6 and	7	26	2.750

Morningside Addition to Sioux Falls.

Howard Holden		1	3	0.022
Wm. Weslund	Lots 2 and	3	3	0.048
Caroline Langager		4	3	0.022
Laura A. Brown		5	3	0.022
David Vesper	Lots 8 and	9	3	0.048
F. I. Hardimon	Lots 10, 11, 12, 13 and	14	3	0.114

Gale's Addition to Sioux Falls.

Frank C. Hardimon	Lots 1, 2 and	3	25	0.343
Chicago, Rock Island & Pacific Ry. Co.	Lots 1, 2, 3, 4, 5 and	6	24	0.550
Anna Bakken	West 50 Feet of Lots 1 and	2	26	0.091

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Ludwig Seubert	East 100 feet of Lots 1 and	2	26	0.137
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Morse's Addition to Sioux Falls.

Stephen Donahoe, Den Donahoe, Dan Dona- hoe, and Wm M. Donahoe	East Half of	1		0.480
Anna Barrett		7	1	0.069
Stephen Donahoe, Den Donahoe, Dan Donahoe and Wm. M. Donahoe	Lots 8, 9, 10 and	11	1	0.400

Millspaugh's Addition to Sioux Falls.

Chicago, Rock Island and Pacific Ry Co.	Lots 1 and	2	13	0.137
Girton-Adams Ice Co.	Lots 1, 2, 3, 4 and	5	14	0.412
P. O. Stiver	Lots 6, 7, 8, 9, 10, 11 and	12	14	0.641
Girton-Adams Ice Co.	Lots 13, 14, 15 and	16	14	0.321

Name of Owner	Description	Lot	Block	Proportion of Benefit.
P. O. Stiver	Lots 1 and	2	15	0.137
Girton-Adams Ice Co.	Lots 3, 4, 5 and	6	15	0.114

P. O. Stiver	Lots 8, 9, 10 and	11	15	0.366
Girton-Adams Ice Co.	Lots 12, 13, 14 and	15	15	0.344
Chicago, Milwaukee & St. Paul Ry. Co.	Lots 16 and	17	15	0.183
Girton-Adams Ice Co.	Lots 10, 11 and	12	28	0.114
Chicago, Milwaukee & St. Paul Ry. Co.	Lots 13, 14 and	15	28	0.275
P. O. Stiver	Lots 16, 17 and	18	28	0.175
P. O. Stiver	Lots 1, 2, 3, and	4	16	0.275
J. L. Brookings	Lots 13 and	14	16	0.137
P. O. Stiver	Lots 8, 9, 10, 11, 12, 13 and	14	27	0.412

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Daniels' Addition to Sioux Falls.

Susan Burke		4	0.480
Chicago, Milwaukee & St. Paul Ry. Co.		5	0.343
Girton-Adams Ice Co.	Blocks 12 and	13	0.916
Kittery Realty Co.	Blocks 10 and	11	1.031

Van Eps' Addition to Sioux Falls.

Joe Tosini	Lots 6, 7, 8, 9, 10, 11 and	12	2	0.229
Jos. Tosini	Lots 1, 2 and	3	1	0.137
Jos. Tosini	Lots 1, 2, 3, 4, and	5	2	0.229
Jos. Tosini	Lots 1, 2 and	3	3	0.069
Inez C. Van Eps	Lots 1, 2, 3, 4, 5, and	6	8	0.275
Inez C. Van Eps	Lots 10, 11 and	12	8	0.137
Inez C. Van Eps	Lots 1, 2, 3, 4, and	5	24	0.114
William Lackay		6	24	0.011
Inez C. Van Eps	Lots 1, 2, 3, 4, 5, 6, and	10	18	0.229
Inez C. Van Eps			19	0.069

Brookings & Edmunds' Addition to Sioux Falls.

Wm. H. Thomas	Lots 10, 11 and	12	31	0.685
Name of Owner	Description	Lot	Block	Proportion of Benefit.
Parlin & Orendorf Plow Co.	Lot 13 and South Half of	14	31	0.344
O. S. Jones Seed Co.	North Half of Lot 14 and South Half of	15	31	0.229
R. A. Wyman	North Half of	15	31	0.115
Jewett Bros. & Jewett	Lots 16, 17 and	18	31	0.685

Braley's Addition to Sioux Falls.

W. Braley		1	1	0.25
W. Braley	Lots 9, 10, 11, 12 and	13	1	0.125
W. Braley			2	0.425
W. Braley			3	0.475

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W. Braley	Lots 1, 2, 3, 4, 5, 6, and	7	4	0.175
C. R. Lewis	Lots 8, 9 and	10	4	0.075
W. Braley	Lots 11, 12, 13, 14, 15, 16, 17, 18, 19 and	20	4	0.25
W. Braley	Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, and	10	5	0.25
W. Braley	Lots 11, 12, 13 and	14	5	0.175
W. Braley	Lots 1, 2 and	3	6	0.125
Geo. F. Boyle	South 88 Feet of	4	6	0.050
W. Braley	North 44 Feet of	4	6	0.025
W. Braley	Lots 5, 6, 7 and	8	6	0.175
W. Braley			7	0.35
W. Braley			8	0.375
Lois W. Jellies		1	9	0.075
W. Braley	Lots 2, 3, 4, 5 and	6	9	0.375
W. Braley			10	0.50
W. Braley			11	0.50
W. Braley			12	0.625
W. Braley	Lots 1, 2, 3 and	4	13	0.10
Anna Vaghn		5	13	0.025
W. Braley	Lots 6, 7, 8, 9, 10, 11 and	12	13	0.175
H. W. Bullard		13	13	0.025

Name of Owner	Description	Lot	Block	Proportion of Benefit.
W. Braley	Lots 14 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and	30	13	0.425
W. Braley	Lots 1 and	2	14	0.05
W. Braley	Lots 3 and	4	14	0.05
W. Braley	Lots 25, 26, 27, 28, 29 and	30	14	0.15
W. Braley	Lots 1 and	2	15	0.025
W. Braley	Lots 26, 27, 28, 29 and	30	15	0.125

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Silver Park Addition to Sioux Falls.

Great Western Investment Co.	Blocks 1, 2, 3, 4 and	5	1.375
Charles N. Hare		7	0.165
F. R. Webber		8	0.275
F. O. Lyford	Blocks 10 and	24	0.357
Great Western Investment Co.	Blocks 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and	23	3.575
N. B. Turner		25	0.275
E. A. Flanders	Blocks 26 and	27	0.550
Great Western Investment Co.	Blocks 28, 29, 30, 31, 32, 33, 34, 35 and	36	2.475
Annie E. Skinner	Blocks 37 and	42	0.550
A. G. Holmes		38	0.275
David B. Stewart	Blocks 39, 40, 41 and	42	1.10
Great Western Investment Co.		43	0.247
Great Western Investment Co.	Blocks 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63 and	64	5.500

Unplatted Lands Situated in Sections 16, 21, and 22, Township 101, Range 49, Within the City of Sioux Falls.

Equitable Realty Company's Sub-division of Tract 1 of the Northwest Quarter of Section 16.

Name of Owner	Description	Lot	Block	Proportion of Benefit.
Dakota Iron Store	Lot 2			1.145
Dakota Iron Store	Lot 3			1.145
Dakota Iron Store	Lot 4			0.480
International Harvester Co.	Lot 1			0.916
Dakota Iron Store	Lots 8 and 9			0.480
Equitable Realty Co.	Lot 5			1.375
289				
Chicago, Milwaukee & St. Paul Ry. Co.	Lot 6			1.833
Chicago, Milwaukee & St. Paul Ry. Co.	Lot 7			1.833
Equitable Realty Co.	Lot 10			2.290

**Equitable Realty Company's Sub-Division of Northeast
Quarter of Northwest Quarter of Section 16.**

Equitable Realty Co.	Lot 1	0.480
Chicago, Milwaukee & St. Paul Ry. Co.	Lot 2	0.685
W. F. Hesse	Lot 3	1.375
Chicago, Milwaukee & St. Paul Ry. Co.	Depot Grounds on Southwest Quarter of Northwest Quar- ter, Section 16	2.062
Chicago, Milwaukee & St. Paul Ry. Co.	Tract 3 of Northwest Quar- ter, Section 16	0.685
Chicago, Milwaukee & St. Paul Ry. Co.	Tract 4 of Northwest Quar- ter Section 16	0.915
Edward Ellis	Tract 5 of Northwest Quar- ter, Section 16	0.229
Larabee Mills Co.	Lot 5 of Sioux Falls Light & Power Co.'s Sub-Division of the Northeast Quarter of Northwest Quarter, Section 16	2.00
Northern States Power Co.	Lot 4 of Sioux Falls Light & Power Co.'s Sub-Division of the Northeast Quarter of Northwest Quarter, Section 16,	2.00
Larabee Mills Co.,	Lot A, Tract 12 of Northwest Quarter, Section 16,	0.29
Northern States Power Co.,	Tracts 6 and 7 of Northeast Quarter, Section 16,	2.583
Name of Owner	Description	Proportion of Benefit.
Watertown & Sioux Falls Ry. Co.	Benefit to Bridge and Track- age across Sioux River on Northwest Quarter, Section 16	4.583
290		
Guy Strahon	Tract 21 of Southwest Quar- ter Section 16 (Except W. 30 ft.)	0.687
A. S. Held and John Schetzel	West 30 Feet of Tract 21 of Southwest Quarter, Section 16,	0.480
F. H. Hollister	Tract 22 of Southwest Quar- ter, Section 16,	0.687
Emerson-Brantingham Implement Co.	Tract 23 of Southwest Quar- ter, Section 16	0.480
Mary C. Brace	Tract 24 of Southwest Quar- ter, Section 16	0.720
Etta Esta Boyce and A. B. Fairbanks	Tract 25 of SW ¼ of Sec. 16	2.062

J. M. Freese	Tract 4 of Southwest Quarter, Section 16	2.750
Sioux Falls Gas Co.	Tract 3 of Southwest Quarter, Section 16	4.478
Chicago, Rock Island & Pacific Ry. Co.	Tract 29 of Southwest Quarter, Section 16	3.437
Chicago, Rock Island & Pacific Ry Co.	Tracts 1 and 2, Southwest Quarter, Section 16	3.437
J. H. Donahoe	Tracts 13 and 15, Southeast Quarter, Section 16.	5.155
Northern States Power Co.	Tracts 15, 16, and 20, Southwest Quarter, Section 16	5.840
Illinois Central Ry. Co.	Depot Grounds on Southwest Quarter, Section 16,	3.895
Chicago, Rock Island & Pacific Ry. Co.	Lots A and B. Sub-Division Tract 17, Southwest Quarter, Section 16	0.480
S. H. Hurst and T. McKinnon	Lot C, Sub-Division Tract 17, Southwest Quarter, Section 16.	0.480
T. McKinnon	Lot D, Sub-Division Tract 17, Southwest Quarter, Section 16	0.343
S. H. Hurst	Lot E, Sub-Division Tract 17, Southwest Quarter, Section 16	0.229
Chicago, St. Paul, Minneapolis & Omaha Ry. Co.	Depot Grounds on Southwest Quarter, Section 16.	4.583
Great Northern Ry. Co.	Depot Grounds on Southwest Quarter, Section 16.	3.437
Farley-Loetscher Co.	Lots D and C of Franklin Investment Co's Sub-Division of Part of Tract 3 of Southwest Quarter, Section 16.	1.145

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Name of Owner	Description	Proportion of Benefit.
Franklin Investment Co.	Lots A and B of Franklin Investment Co's Sub-division of Part of Tract 3 of Southwest Quarter, Section 16.	1.145
H. R. Dennis	East 132 Feet of Tract 14 of Southwest Quarter, Section 16.	1.145
Albert Larson and Geo. E. Larson	Except East 132 Feet, Tract 14 of Southwest Quarter, Section 16.	6.874
A. C. Schoeneman	Tract 8 of Southwest Quarter, Section 16	8.593
J. W. Tuthill	North 50 Feet of Tract 9 of Southwest Quarter, Section 16.	0.572

John C. Felger	Except North 50 Feet, Tract 9 of Southwest Quarter, Section 16.	1.145
John W. Tuthill Lum- ber Co.	Tract 12, Southwest Quarter, Section 16.	0.343
John W. Tuthill Lum- ber Co.	Tract 13, Southwest Quarter, Section 16.	2.750
John W. Tuthill Lum- ber Co.	Tract 7, Southwest Quarter, Section 15.	2.062
B. W. Harding	Tract 6, Southwest Quarter, Section 16.	0.687
A. J. Jordan	Tract 5, Southwest Quarter, Section 16.	2.062
John W. Tuthill Lum- ber Co.	Tract 7, Southeast Quarter, Section 16.	0.916
M. Margulies	Tract 8, Southeast Quarter, Section 16.	0.229
M. Margulies	Tract 10, Southeast Quarter, Section 16.	2.290
W. H. Lyon	All that part of Tract 2 of Southeast Quarter of Section 16 lying West of Franklin Avenue	1.375
Board of Education of the City of Sioux Falls.	All of Franklin Investment Co's Sub-Division of No. 1 of Part of Tract 2 of Southeast Quarter, Section 16.	1.833
292		
J. H. Drake	Tract 1, Southeast Quarter, Section 16.	2.062
Girton-Adams Ice Co.	Tract 12, Southeast Quarter, Section 16.	2.290
Sioux Falls Gas Co.	Tract 3 of Northeast Quarter, Section 21.	1.375
E. H. Hyde	Tract 12 of Northeast Quar- ter, Section 21	0.916
Girton-Adams Ice Co.	Tract 4 of Northwest Quar- ter, Section 22.	0.572
Joe Tosini	Tract 2, of Northwest Quar- ter, Section 22.	1.375
Inez C. Van Eps.	Tract 1 of Northwest Quar- ter, Section 22.	2.062
Ed Bell.	Tract 1 of Northeast Quar- ter Section 22.	0.329

Name of Owner	Description	Proportion of Benefit.
City of Sioux Falls	Parks, Water System, Highways and dedicated streets within the drainage area.	111.11
Sioux Falls Township	Two and one-half miles of laid out and established highways within the drainage area.	0.384
Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area.	0.072
Mapleton Township	Twelve miles and fifty-two rods of laidout and established highways within the drainage area.	10.468
Sverdrup Township	Fifteen and seven-eighths miles of laid out and established highways within the drainage area.	21.252
Dell Rapids Township	One and three-eighths miles of laid out and established highways within the drainage area.	2.323
Minnehaha County	Benefits arising from and to the safety and preservation of bridges within the drainage area.	55.555
293		
Chicago, St. Paul, Minneapolis & Omaha Ry. Co.	Right-of-way as laid out and located across Section 18, Township 101, Range 49, and Section 13, Township 101, Range 50 West of the 5th P. M., within the drainage area (1.5 miles)	15.263
Watertown & Sioux Falls Ry. Co.	Right-of-way as laid out and located across Sections 4, 5, and 9, Township 101, Range 49, and Sections 29 and 32, Township 102, Range 49, West of the 5th P. M., within the drainage area (2.60 miles),	
Chicago, Milwaukee & St. Paul Ry. Co.	Right-of-way as laid and located across Sections 4 and 9, Township 101, Range 49, and Sections 4, 9, 16, 21, 28, and 33, Township 102, Range 49, and Sections 5, 8, 17, 20, 28, 29, and 33, Township 103, Range 49, and Section 32, Township 104, Range 49, West of the 5th P. M., within the drainage area, (the above being the Sioux Falls and Egan line), also across	

Sections 5, 8 and 9, Township
103, Range 49, West of the
5th P. M., within the drainage
area, (being the Renner and
Madison line), total 14.5
miles

147.533

All such owners and all persons interested are hereby notified and summoned to show cause at the time and place aforesaid why the proportion of benefits shall not be fixed, as stated, and the said determination of said Board made final.

Dated March 8, 1919.

A. G. RISTY

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Chairman of the Board of County Commissioners of Minnehaha County,
South Dakota.

Attest:

E. H. Shenkle
County Auditor
(Seal)

Filed in the office of the Auditor of Minnehaha County, S. D. this 8 day of March, 1919.

E. H. SKENKLE

County Auditor.

It is stipulated that attached to the bill of complaint herein is a true copy of the drainage ditch notice of hearing upon the question of equalization of apportionment of benefits of Drainage Ditch No. 1 and 2 on the 1st day of August, 1921, caused to be published by the Board of County Commissioners of Minnehaha County, South Dakota, said Drainage Ditch Notice being Marked "Exhibit C".

Exhibit "C" attached to the bill of complaint is offered in evidence by plaintiff and received in evidence.

(Exhibit "C" being printed herein as an exhibit to the bill of complaint, is not at this place reprinted.)

(Cross-Examination of witness F. E. Ward)

The proportion of benefits of Drainage Ditch No. 1 and 2 was not equalized upon the notice returnable April 25th, 1919, upon that date or at any other time. The proceeding was abandoned on account of errors in the published notice.

A. G. RISTY called and sworn as a witness for the plaintiff testified as follows:

(Direct Examination)

My name is A. G. Risty; I am one of the defendants in this action and am and for nine years have been a member of the Board of County Commissioners of Minnehaha County, South Dakota; for about seven years I have been Chairman of the Board; in the spring of 1919 the County Commissioners passed a resolution apportioning the benefits for Drainage Ditch No. 1 and 2; notice of hearing upon the proposed equalization of such benefits was published; the plaintiff's Exhibit "A" is the notice I refer to; I was a member of the Board at the time of making that apportionment of benefits.

295 Q. Please state to the Court, Mr. Risty, in what manner and upon what basis you determined, in the resolution referred to, the proportion of benefits to the Chicago, Minneapolis, St. Paul & Omaha Railway?

Objected to by defendants as incompetent, irrelevant and immaterial, the record now showing that the exhibit referred to by counsel in his question, that the proceedings therein were abandoned and are not the proceedings upon which the present actions were instituted, or the present controversy before the court.

Counsel for plaintiff: I state to the Court this is offered solely for the purpose of showing to the court the attempted application by the County Commissioners of the law which we are questioning.

The evidence received subject to objection.

A. Well, in all those cases we tried to take into consideration the right of way, the value of the line as compared with adjacent lands and the benefits that might be derived from this drainage proposition as to the maintenance of the track and the bridges and so on.

In determining the apportionment of benefits as stated in Exhibit "A" to the Chicago, St. Paul, Minneapolis & Omaha Railway, 1.5 miles; to the Watertown & Sioux Falls Railway Company, 2.60 miles; and to the Chicago, Milwaukee & St. Paul Railway Company 14.5 miles; I don't think we computed on a mileage basis; we may have had that number of miles in mind, but we tried all the while to base it on a certain unit, as I remember it.

Q. Just how, Mr. Risty, did you compare the alleged benefits to the three railway companies mentioned, with the unit of agricultural lands to which you have just referred?

A. How we determined the units for the railroads?

Q. No. How you compared the alleged benefit to the railroads with the unit you have referred to.

A. Well, we arrived at—I don't remember what value we passed on that unit at that time (referring to the agricultural unit). We had the value fixed of the agricultural unit and the proportion of benefit that this drainage would be to that unit; when we came to the railroad question and other properties we took into consideration the benefits that they would derive and I might say we capitalized that—how much the average annual benefit would be to those properties, we might say to a certain piece of railroad, and having that amount fixed, we took the benefit that this unit of farm land was supposed to have and divided the benefits of the railroads—for instance we will say the unit of the farm land was \$100; we would make the proportion of the benefit 25% or \$20; then when we came to place a unit on other property after having exercised our judgment and made our investigation as to what those benefits might be, we arrived at a certain amount; we divided that by 25, the benefit of the farm unit and that gave us the number of units that we would assess up to that property or railroad, you might say if you wish; I am now testifying with reference to the procedure in 1919; we employed about the same procedure all the time.

Q. Mr. Risty, I call your attention to the fact that the units tentatively assessed to each railroad company in the drainage notice Exhibit "A" bears the same proportion to the mileage of said railway company in each case; with that in mind will you state to the court whether or not that attempted assessment was made by you upon a mileage basis?

A. The mileage basis—if it is the same number of miles or if it is the same per mile for each company, then we must have estimated that the benefit was about the same and that [give] the same number of units per mile.

In our attempted fixing of proportion of benefits which is in question in this lawsuit I don't think we used the mileage basis but I don't remember positively.

With reference to drainage Ditch No. 1 and 2 no warrants to any great amount have been issued since the time of fixing this proportion of benefits in the spring of 1919; it might possibly be that the cleaning

of the ditch was not paid at that time; I don't remember that would be the kind of work that has been paid for since if it wasn't paid for before that; we have done some work around the foot of the spillway and so on since the publication of this notice in April, 1919, but I don't remember what it cost.

Q. In what manner, Mr. Risty, did you determine the benefit to the unit of agricultural land in 1919?

A. We made an estimate of what that land was worth according to our judgment and how much more it would be worth after it had the benefit of this drainage ditch, fair value, I don't remember we had any other basis to go on other than our own judgment as to the value of the land before the drainage and after the drainage.

We arrived at our determination with reference to the benefit of 111.11 units to the parks, water system, highways, and dedicated streets of the City of Sioux Falls without the drainage area in April, 1919, in just the same way as I stated

to you that we arrived at the benefit to the railroads
298 and so on; what in our judgment we thought was the

benefits; we fixed the amount that in our judgment we thought was right and proper and divided by the benefit to the agricultural unit to get the number of units in regard to this other property; we based that judgment upon the fact that some of us, most of us, are farmers or were farmers and we all know the price of land—was selling it at that time; with reference to parks, water system, highways, and streets of the City of Sioux Falls we based our determination upon the same facts as we used in regard to all other property; we estimated according to our judgment and our investigation what these properties had cost and what benefit they were to the public, what loss they would be at in case they were annually overflowed; to some extent we used the cost of the parks of the City of Sioux Falls; the cost of the water system of the City of Sioux Falls was talked of; we made our determination on the estimate of the cost and the benefit that those properties would derive; we never had a hearing; it might be more and it might be less we didn't get far enough to hear the other side; we made an estimate of the damages that might accrue in case the highways and streets of Sioux Falls were overflowed; we based that estimate on our best judgment; suppose you have a building down along the Sioux here and have it overflow; the basement filled with water; your own estimate on what damage it would be to you and it would vary probably a great deal from mine; neither one might be correct. It is doubtful whether you and

I would agree. I have stated the manner in which we compared the benefits to the parks and water system, streets and highways of the City of Sioux Falls with the agricultural unit; we took the public highway that would be annually overflowed; we had in mind as road builders what damages that would be to that road; in our judgment we fixed the damages to be what we thought were right and the number of units on that piece of property; then we proceeded as in all other cases, divided by the benefit to our original unit; to get the number of units we first attempted to determine what the benefit was and then divided it to get the proportion; it is possibly a fact that the unit as used by us in the measurements in the spring of 1919 represented approximately \$80.00 or \$85.00 in cost; we used at 10A. unit; I am not certain whether the unit was supposed to have been benefitted \$80.00 to \$85.00 or \$7.00 to \$8.00 per acre, that might be it, I don't remember.

Q. I now call your attention, Mr. Risty, to the drainage notice providing for hearing on the 1st day of August, 1921, upon the equalization of benefits of drainage ditch No. 1 and 2 and call your attention to the benefits to roads, railroads, etc. and ask you to state to the court in what manner and upon what basis you arrived at your determination with reference to the proportion of benefits to the Chicago, Rock Island & Pacific [Rr]., the Chicago St. Paul, Minneapolis & Omaha Ry., the Great Northern Ry., the Chicago, Milwaukee & St. Paul Ry., the City of Sioux Falls, and the Northern States Power Co., referring particularly to the benefits to the Hydro-Electric plant and water rights of the Northern States Power Co.

Mr. Bartlett: "That is objected to as incompetent, irrelevant and immaterial, not within the issues that can be tried by this Court in this collateral action, the same being a legislative matter and not subject to inquiry in this Court, it not having been alleged in plaintiff's bill of complaint herein that the Commissioners acted fraudulently or arbitrarily."

300 The Court: "Received, subject to objection."

A. As to the railroads and other property mentioned in this question we arrived in the manner stated before; we took into consideration the value of the right-of-way compared the right-of-way with adjacent lands and what protection from this water would benefit them and the savings it would be in upkeep of the railroad track, bridges, etc; in regard to the Hydro-Electric Co. plant we took into consideration the overflow and high water that would clog up their

turbines and put them out of working order for some time, and we had in mind the great overflow of 1881 when it swept out the lumber yards down there and took out the mill at the foot of the falls, and in our estimation after having taken all those things into consideration which I wouldn't mention all now, we arrived at the conclusion that this water, the drainage proposition was of immense value to the Water Power Co. and we figured on that with a good deal of care and then I think we arrived at the amount of \$50,000.00; I would not say positively that was the amount; we compared the benefits which we arrived at to the Northern States Power Co. with the benefit to our 1A tract of agricultural land as I have stated before; the benefit to that unit we said was \$25.00; when we had estimated the benefits to the water power company was \$50,000.00 we wanted to find out how many units that it represented and we divided it by 25 and that gave us the number of units that would be assessable to the water power company; I suppose there was no material increase in value of the railroad companies' rights-of-way and other property I have mentioned by the making of these two apportionments of benefit unless it might be increase in

value with the value of other property increased at
301 that time, but the expenses to be paid were more;

there were probably in the neighborhood of \$250,000.00 of ditch warrants outstanding at the time we made this apportionment of benefits in 1919; I know there has been some issued since but I don't know how much; in estimating the benefits to various railroad companies in our last apportionment of benefits, we had about the same ideas as we did in 1919; we did not use the mileage basis or farm basis or street basis anywhere; we used the units.

Q. Just how did you use the units, that is what I am trying to find out?

A. When we find out what amount we have to raise—when we come to levy the assessment, the proportional benefits will be assessed to each unit—one unit may be 100%, another is 150% and some only 10%, others 25%; they won't all be alike, of course they are not benefitted alike; in arriving at our determination in 1921 of the last apportionment of benefits and the number of units of the benefit to the Chicago, Rock Island & Pacific [Rr.] Co. we took into consideration the damages that might be done to the railroad tracks with high water to the grades; and in regard to the bridges, bridges could be built smaller; wooden bridges generally have a duration of about ten years and if they could get along with small-

er bridges or make grades instead of [tressel] works which would be a benefit to the company; we inquired minutely into those things but as I say haven't heard the other side; we might be away off; the hearing was not allowed and we didn't get any basis from you folks on that question; we determined that the benefit to the track of the Rock Island Ry. from the ditch was a certain specified amount in dollars and cents; I wouldn't say that we put those amounts on record; that is the way we arrived at our units; we took into consideration in determining this benefit the fact that the Rock Island
302 might build a shorter bridge somewhere and that was part of the basis of our assessment of benefits; after arriving at the amount of dollars and cents benefit we proportioned it by dividing by the value of the unit; in determining the proportion of benefits to the Chicago, St. Paul, Minneapolis, & Omaha, the Great Northern, the Chicago, Milwaukee & St. Paul Railroad Companies we followed the same procedure; the basis for our determination of the benefits with reference to the highways, streets, water supply, water plant, Sherman Park and Phillips Park in the City of Sioux Falls was as I have stated to you before; it may seem [arbitrarily] but in regard to county highways for instance, we knew pretty well what it would take to keep them in good passable condition in seasons when there was any overflow and in seasons when there was no overflow; in regard to the streets and basements that have been flooded each year I made an estimate as to how much it would damage a basement if filled with water; same way to the streets, same way to the parks; If you had ever had a hearing those things would all have been adjusted. I wouldn't say absolutely that we did in 1921 the same as we did in 1919 with reference to the city; we had the same idea in mind when we gave it reconsiderations and wherever we saw we could improve, we did it to make a more equitable proportion; in my judgment and in the judgment of the commissioners the last proposition is better than the first one; I don't want to say we absolutely followed the methods of the first instance or we followed any particular practice in the last instance; it may be we did and possibly we didn't; in arriving at the determination that the benefit to the Hydro-Electric Co. plant of the Northern States Power Co. was about \$50,000.00, we based our determination upon the following facts; in the first place we have a stream that tends to give a steady flow of water around the bend so that it will not go over the spillway; in one certain place about 3 miles northwest from
303 town outside of the ditch proper, the river broke through and would eventually have cut across the bot-

tom and into the spillway and we dammed that up; then we took into consideration the high water backing up and filling up the gorge below their plant so that at certain times the water power would not be serviceable and that it would cost them fuel and other items to a great extent and then primarily, any water which overflowed would be apt to sweep out everything around that electric plant if they should have an overflow like 1881.

Q. You say there was danger of some ditch cutting through and diverting the water out of the river?

A. Yes sir.

Q. State whether or not that was the Ditch No. 1 or ditches Nos. 1 and 2 which were constructed by the Board of County Commissioners, the records of which have been placed in evidence here.

A. Those ditches were established and built before my time on the Board and that might possibly have been that it was cutting into Ditch No. 1 and making that immense excavation, but I would not say. But it was necessary to have it dammed up according to the orders of the hydro-electric engineer; the ditch I refer to must have been probably the terminus of ditch No. 1; the engineer gave orders it had to be dammed up absolutely.

Q. In just what manner did you arrive at the fact that this alleged benefit to the Northern States Power Company amounted in dollars and cents to approximately \$50,000.00?

A. After taking those things into consideration, that was our best judgment. We might have itemized it and added it up; I don't remember that; but according to our best judgment that would be reasonable assessment upon the water power company.

We based that judgment upon these benefits I have
304 stated to you; giving them a uniform flow of water in dry seasons and protecting them from overflow when we had an overflow season; I have stated practically everything that was taken into consideration in determining that the Northern States Power Co. was benefitted \$50,000.00. if I remember right.

Q. I call your attention, Mr. Risty, to the alleged benefit in your apportionment of 1921 to the Chicago, Milwaukee & St. Paul Railway; benefits to right-of-way, tracks, embankments, bridges and grades across sections 4, 9, 16, 21, 22, Township 101 Range 49, and across sections 4, 9, 16, 21, 28, 33 Township 102 Range 49, and across sections 5, 8, 17, 20, 28, 29, 33 in Township 103, Range 49, and ask you to tell the court what you took into consideration in determining that the Chi-

ago, Milwaukee & St. Paul Ry. Co. was benefitted 1678.9 units.

A. We took into consideration what it would damage the tracks—what the damage would be if those tracks washed out and the expense to rebuild them, and with the assistance of a competent railroad engineer we arrived at those figures that we have given there.

We assumed that except for this spillway these tracks of the Chicago, Milwaukee & St. Paul Railway would wash out and be under water for a certain period; I have seen the Milwaukee road under water 8 or 10 days at a time when they had to run their trains around to Pipestone on other railroads; I don't remember what proportion of its tracks we assumed would wash out; the distance used is about equal to the lands that overflow; those lands that overflowed and had the tracks on; of course it would overflow the tracks; I don't remember how many miles we estimated that to be; we tried to figure it out and our engineer worked it out and that was the number of miles; the tracks were on land subject to overflow, that is what determined the distance; with reference to the bridges of the Chicago, Milwaukee & St. Paul Railway in arriving at this benefit—I don't remember whether there is any more bridges on the Milwaukee; yes, there is two; we took
305 into consideration that by diverting the great volume of water from the river into these ditches, their bridges would be less subject to destruction by the ice gorges and by high water and that they could be made smaller when they come to build new ones because they would not have such high waters; the water would be divided between the river and the ditches; in arriving at that feature of the benefit in dollars and cents we figured out with our engineer what it would cost to build and maintain bridges of the size they have now and what it might cost to build them smaller and their
306 relief when they were subject to overflow and ice gorges; these were the elements we had in mind.

After the filing of the Blackman petition in 1916 when it was decided that the spillway was to be repaired we employed engineers to go ahead and investigate that and it took about a year and a half before all of the preliminaries were taken care of so that we went to actual excavation on the structure; we employed a competent engineer and he laid the plans and we let the contract to a contracting company here, they were to have a percentage for their work; they proceeded to sink that shaft and make the channel of the spilling basin; to put it all in shape that it is at the present time; on the river we

straightened a number of bends, made cuts across bends and straightened out the river to facilitate the flow of the water; I think Ditch No. 2 was cleaned about as far as Renner; then the time arrived that the ditch warrants did not sell any longer and we had no means to complete the work; there always were control gates at the head of Ditch No. 2; we made no change at the head of Ditch No. 2 after the filing of the Blackman petition if you call the end of it up there near Baltic where the ditch begins; it crosses the river at one certain place up there and if you have reference to where this lower part is started, there we built a small dam of willows
307 and earth to keep the water from coming out of the ditch entirely and doing damage that way; the route of the ditch was left the same as the route of Ditch No. 1 and Ditch No. 2, the old ditches; no changes was made in the initial point or terminal points of either ditch.

(Cross-Examination).

Prior to the attempt to fix the proportion of benefits in 1919, no topographical survey was made or thorough investigation upon which to base the assessments or fix the benefit. In order to save money we thought the old survey would answer; in making the proportional benefits we took the old figures and old survey to avoid expense; we didn't get far enough to make any assessment on any particular tract of land; the Board abandoned that attempt to fix the proportion of benefits because of an error in adopting three units instead of one; after that time the Board caused a full topographical survey to be made by Chenoweth & Rettinghouse of this city and a thorough investigation of the benefits that would accrue to the various properties within the drainage area; Mr. Rettinghouse reported and explained to us the conditions which he found generally throughout the drainage area and the property that was benefitted; in making that report he stated to us the various elements that he considered as benefits and submitted to us the facts upon which he based his conclusions; Mr. Rettinghouse as our engineer made the computation with reference to this apportionment of benefits and the plans and we talked it over and he was practically the one that planned how it should be done; he done all the figuring and the computations; before we adopted the resolution of June 10, 1921, we had been fully advised as to the topographical situation and the elements that went into the fixing the proportion of benefits against each of the various pieces of property that we deemed to be benefitted; the board made a personal investi-

gation of all the property within the drainage area and
308 determined the benefits before we adopted this resolution; we selected as a unit an acre of land about three miles north of town in the district between the river and the ditch and visited that unit in company with Mr. Rettinghouse; we determined that in our judgment that unit was benefitted by the improvement 25%; in reaching that conclusion it seems to me we valued the unit without the drainage at \$100 and with the drainage at \$125.00; it being our judgment that the real benefit to that unit was the sum of \$25.00; after determining the value of this unit we proceeded to equalize and fix the proportion of benefits among the other property; the engineer accompanied us and had with him various figures and maps he had made showing these tracts, we referred to the map right along as we traveled; the Board proceeded to investigate the whole territory proposed to be assessed on this basis investigating first upon the east side of the river and then on the west side and then around the bend clear in through town; we looked over the railroad situation and other properties including the power plant, city streets, parks, and water system that in our judgment were affected; my judgment and the judgment of the board coincided almost entirely with the report of the engineer, Mr. Rettinghouse, with reference to these various proportions of benefit; after having made our investigation and having had the elements of benefit explained to us by the engineer, the board exercised its judgment and concluded that these properties were actually benefitted relatively or approximately as the engineer had reported them, we considered as a basis for making assessments on these various properties the acreage of the right-of-way within the drainage area; with reference to the Great Northern Railroad property, Mr. Rettinghouse gave us the facts as to the area within the various territories; he pointed out to us that certain bridges would be benefitted by reason of it, that certain bridges might be shortened
309 by reason of having the water by-passed through the ditch; all of these facts together with the betterment or saving in maintenance on the roadbed were considered by the Board in determining and fixing the proportion of benefit as against the Great Northern Railroad; in like manner the engineer explained the amount of acreage of right of way of the Chicago, Rock Island & Pacific within the drainage area would be protected and benefitted the same as the adjacent farm lands; he pointed out that there was a certain length of its track that would be affected in having its maintenance cheapened by the drainage and that certain of its bridges

might be shortened and were protected by reason of this drainage ditch by-passing the portion of the water that would come down the river; those amounts were all taken into consideration and passed upon by the Board in determining the amount of benefit our judgment indicated the Chicago, Rock Island & Pacific received; the Chicago, Milwaukee & St. Paul Railway extends almost the full length of this ditch and adjacent to it; in some places the track is right along the ditch and in other places it runs pretty close to the ditch all the way; it might possibly be 80 rods away where the ditch crosses the river at Renner; he explained the amount that this railroad benefitted upon the same proportion that the farm lands adjacent thereto; that the embankments, tracks and roadbeds were benefitted in the same manner by being made more substantial and requiring less upkeep; that there was a certain number of bridges that could be shortened and a certain bridge might be abandoned by reason of by-passing this water; these matters were all taken into consideration by the Board in determining the amount of benefit that we fixed against the railroad for its proportion and the amount of benefit was figured out by Mr. Rettinghouse for us in the manner in which I have testified on the basis of maintenance
310 and upkeep; the Chicago, Minneapolis & Omaha Railway extends directly across the project in two places and Mr. Rettinghouse explained to us that its right of way would benefit the same as adjacent land and that its roadbed was benefitted by being more easily maintained; that there were a certain number of bridges over the Sioux River and adjacent thereto that were protected by the drainage; that a certain number of trestles might be shortened or abandoned and that by reason of these benefits the railroad company was actually benefitted a certain amount and it was in our judgment; we took all these matters into consideration and exercised our judgment in determining the amount to be fixed as against these various properties.

Mr. Rettinghouse, as our advisor, explained to us the number of miles or blocks of streets in the city of Sioux Falls that were within the drainage area and would be benefitted by being protected and drained by this drainage; also the benefits that would accrue to the two city parks and to the Sioux Falls water system and the elements of such benefit; the Board took all these elements into consideration in exercising its judgment and determining the amount of proportional benefits which it fixed against the city of Sioux Falls.

At the same time, Mr. Rettinghouse explained to the Board and the Board considered the elements of benefit which would

accrue to the Northern States Power Co. by reason of the drainage; we went through that very thoroughly; the facts that the dam was put in adjacent to the river near Schjodts, about three miles north of the city of Sioux Falls and that the controlling works in the nature of wiers were put in at Thompson's about ten miles north of the city were considered as elements of benefit to the Northern States Power Co. by reason of holding the water in the river and permitting to flow down and over its power plant; to by-pass the flood water or a portion thereof through the ditch and save the
311 retarding effect of permitting that flood water to pass over the dams of the power company and pile upon and retard the whole power produced at the power plant also was considered an element of benefit; all of these matters were taken into consideration by the Board in determining the amount of benefit that should be fixed against the Northern States Power Co. The construction of this drainage project, several river cut-off channels, were put in up the river north of Sioux Falls, and in determining the Northern States Power Co. benefit the Board took into consideration the effect and influence of these cut-offs in hastening the flow of the flood water down the stream and shortening the time of floodage upon the power plant. All of these matters were taken into consideration by the board in exercising its judgment of the amount that should be fixed, in the first instance as against the Northern States Power Company.

The work that the Board did upon this drainage project consisted of constructing the spillway, cleaning and widening and deepening the ditch between here and Renner, diking the ditch and putting in the dam at Schojds and controlling works at the Thompson Bridge, and putting in these numerous river cut-offs.

The Court: Where is the Thompson Bridge?

A. Up where the ditch ends and turns into the river, and crosses the river and goes up on the other side.

The Court: How far is the Thompson Bridge from Sioux Falls?

A. About 12 or 14 miles.

The Court: How far is Renner from Sioux Falls?

A. 8 miles.

Q. Do you know the approximate present width of the ditch as it extends from Sioux Falls to Renner, or
312 thereabouts?

A. No, I don't. That would be a mere guess.

Q. Isn't it in the neighborhood of 80 to 100 feet?

A. It probably is as far North as Renner.

Where we diked the ditch had taken the channel of the creek; there hadn't been dirt enough taken out to make a dike and when the floods came it backed up on the farm lands to the west of it; we diked there probably five or six feet high; and protecting those farm lands from overflow from the ditch after that; the dam at Schojdt's covered the break in the bank of the river about 150 feet wide and had the effect of keeping the water from the river from flowing in the bayou that is tapped by the ditch.

After the attempted assessment made in 1919, some work was still to be done in cleaning a portion of the ditch from Renner to the railroad tracks; settlement for this work had not been fully made.

Q. And this dam at Schjodt's that has finally been made to stand was not in at that time?

A. No, it was not.

Q. And some repair work has been done on the spillway since that time, has it not?

A. Yes, the control work at the bridge at Thompson's was put in since that time, but at the initial point of the ditch we haven't made any change.

Exhibit "1" is a copy of a map of the territory affected by drainage ditch No. 1 and 2 submitted by Mr. Rettinghouse to the Board as a part of his report.

We had a map similar to this upon which the percentages were marked before us when we made the inspection of the drainage area before making the apportionment of benefits, on June 10th last.

Exhibit "I" offered in evidence by defendants and received in evidence.

313 Q. Mr. Risty, in applying and using this unit as explained by Mr. Rettinghouse to you, and as followed by the Board in fixing these apportionments of benefits of the various properties affected, you stated that you determined what the actual benefit to the unit selected was, and that its value was twenty-five dollars? A. Yes sir.

Q. Did you use that value of twenty-five dollars as the actual benefit to the unit in determining the apportionment of benefits which each of the various classes of lands aside from farm land should be assessed in this drainage proceedings?

A. We did. This was in regard to farm lands.

Q. And your engineer figured out the total benefit to each of these various pieces of property and divided that benefit by twenty-five, the value of the unit, to determine the number of units to be fixed against these various pieces of property?

A. Yes, that is the way we determined the number of units.

Q. That applies generally to all of the plaintiffs in these actions? A. Yes sir.

Q. Your understanding is that in determining the amount of the assessment upon this basis, that the total number of units are added together to determine the number of units, and the total cost of the ditch is computed and the total cost is divided by the number of units to get the actual assessed valuation of a unit? A. Yes sir.

F. W. WARD recalled on behalf of plaintiffs testified as follows:

The plaintiff's Exhibits "B" and "C" are part of the files and records of my office.

Exhibit "B" was offered in evidence by plaintiff and received in evidence. It is the resolution of the County
 314 Commissioners of Minnehaha County fixing the proportion of benefits on drainage ditch No. 1 and 2, dated June 10th, 1921; it is not printed here because it describes the same property, names and same persons, and fixes the same units as are described, named and fixed in Exhibit "C" printed as a part of the bill of complaint herein.

Exhibit "C" was offered in evidence by plaintiff and received in evidence. It is the same as Exhibit "C" printed herein as a part of the bill of complaint and for that reason is not reprinted here.

H. E. BARLOW, called and sworn on behalf of the plaintiffs, testified as follows:

(Direct Examination)

I am civil engineer of the Chicago, St. Paul, Minneapolis & Omaha Railway; the Sioux Falls-Mitchell branch of the Omaha enters the City of Sioux Falls from the west, crossing the big Sioux River and the bottoms approximately three miles west of the city. The line then swings somewhat to the south and enters the city on the southeastern corner again

crossing the Big Sioux River and through the station grounds runs approximately north and south; the spillway is a couple of miles north of the line of the Omaha; in the west portion of the City of Sioux Falls there is a spur track known as the west side spur, which branches off from the main line a short distance west of the westerly course of the Big Sioux River, and runs approximately north and south for a distance of about a mile; the Omaha railroad has no agricultural lands in the City of Sioux Falls other than its right of way and depot grounds or in the drainage district involved in this controversy; all of its property consists of its railroad right-of-way, station grounds and appurtenances and is used exclusively for railroad purposes.

315 I know Mr. Rettinghouse, the engineer of the County Commissioners in this drainage ditch matter; I called upon him at his office in Sioux Falls and had an extended conversation with him during which he very kindly outlined the method by which he had arrived at the amount of benefits; this conversation was in February or March last; the information was given me by Mr. Rettinghouse but not in confidence; the method he used in arriving at the total benefits deals primarily with the question of bridges; at the point where the Omaha crosses the bottoms west of town, we have in addition to a hundred foot steel span over the main channel, an approach bridge approximately 233 feet long, and two other bridges east of the main river bridge, one 126 ft. and one somewhat shorter; in addition to these bridges we have a small one span pile bridge considerably west of these bridges which takes care of local drainage only and is not concerned in this question; Mr. Rettinghouse has figured that by reason of the diversion of a certain amount of flood waters of the Big Sioux River by means of the spillway constructed by the County authorities, the Omaha Railway would be justified in filling in certain of these approaches, particularly our bridges known as 129 and 130, aggregating 239 feet in length; those are the bridges a mile east of the main bridge over the river west of town about three miles out; he has figured that it would cost to rebuild these bridges about \$25 a foot or \$5975; he has assumed that it will be necessary to rebuild these wooden structures about once in ten years; he has therefore figured that the average annual expenditure would be one-tenth of \$5975; he has capitalized this amount at 7% arriving at \$8536; then he has deducted the cost of filling these bridges and the riprap necessary to protect the dam; he has used this at \$2000, which deducted from the \$8536

316 makes a net of \$6536 benefit on account of filling bridges 129 and 130; in a similar manner he has figured that we could fill the approaches to the two steel spans we have here in town, where the amount of pile bridging is 166 ft. going through the same proposition and capitalizing the annual expenditures and deducting the cost of filling he has arrived at \$2930; these bridges which we have here in town are what are known as through bridges; the supports are above the track, and Mr. Rettinghouse has figured that if the Omaha Company thought it desirable it might rebuild those bridges and substitute the deck built character construction which is a cheaper type construction, and by using shorter girders and necessitating two additional piers, this type of construction could be used, and he has planned that to reproduce these bridges as through structures would cost \$45,500 and with the deck plate girder type would cost \$25,500, making a difference of \$20,000; then there is one other item which relates to the maintenance of the roadbed of the mile and $\frac{3}{4}$ length of track we have west of town in the district; this track has an embankment varying from 3 to 4 ft. to 10 or 12 ft; he has figured that on account of the diversion of a part of the flood waters, the embankment would be less, consequently the amount of labor that would have to be expended in keeping up the track would be less by an amount equal to \$100 per year; he has capitalized this \$100 at 7% arriving at \$1400; in summarizing all of these items he arrived at the total benefit of \$30,866; now the assessment of the Omaha is fixed at 839.45 units; if 1 unit is approximately \$9.50, the total assessment would be \$7975; the total amount of benefit divided by the total number of units would make an average value of about \$36 for the unit; he has assessed us at approximately 25.8% of the total benefits; figuring the one unit as \$9.50.

The situation at the west crossing is that we cross the valley approximately at right angles; the valley is quite wide at this point; the track is on an embankment and has 317 these 4 openings; three of them are at a distance of about $\frac{1}{4}$ of a mile; the land north of the track on the upstream side is cultivated to a considerable extent, not in the immediate vicinity of the bridges, but a short distance each way from the river the land is cultivated; in a time of normal high water this land is flooded and on account of the likelihood of holding this water an unnecessary length of time on this bottom land if we don't have considerable opening there through our embankment and taking into consideration the danger to the roadbed that might result if we closed

the opening, it is my opinion that we would be unjustified in reducing the size of our openings or the length of them; in my opinion there are absolutely no benefits resulting to those bridges west of the city or to the railroad west of this city by virtue of this drainage ditch construction.

Referring to the bridge west of the depot in the City of Sioux Falls and taking up the question of the substitution of the belt girders for the trestles; the fact of the matter was that the Omaha Company has no intention of making any changes in these bridges; the bridges are amply strong for the locomotives we are now running or which we anticipate we will run in the future; there is absolutely no reason for disturbing the bridges at all; furthermore, if we should decide ever to substitute the plate girders we could do so and still have the light iron at about the high water of 1881.

There is one other point that has not been covered and that is in regard to filling the pile approaches; there are short approaches at each end; the west approach is 62 or 63 feet; and the east approach is 103 ft; we have felt that we could fill both of these approaches whenever we got around to it and could at any time; as a matter of fact it would involve considerable expense and we have felt it would
318 be better economy to maintain that type of approach; as to the filling of those approaches the drainage ditch construction has no effect one way or the other.

I have figured up the acreage the right-of-way of the Omaha Railroad in the drainage district amounts to; we have 22 acres on the main line, 21.2 of which is on the west bottom and 5.89 acres on the west side spur previously described; these figures, include .8 of an acre in the vicinity of the bridge out here in the city and includes all the right-of-way within the drainage district sought to be assessed.

319 (Cross-Examination)

I have been in the business of civil engineering something over 22 years and have occupied my present position since the first of March 1920; it is a fact that water in flood seasons permitted to stand along side of the embankment which supports the tracks of the railway has a tendency to weaken that embankment and it necessarily requires a greater outlay of money to keep the bank in solid form; as a general proposition the more water standing there the more effect it has.

Q. Do you know when these bridges were built west of town?

A. I think our records disclose that they were built about 1880 or 1879, along in there.

Q. Then these extra full bridges were built at a time when all water was coming down the river?

A. Yes sir; the engineer building the bridges would naturally have in view that they would take care of all the water that came down the river; if the evidence should disclose in this case that from $1/3$ to $1/2$ of the water that comes down the river was diverted and does not pass under this bridge, it would not be the reasonable conclusion that at least part of the bridge could be done away with; I don't know how much water stood out there last year north of those bridges on the uphill side of those embankments; I don't know how much water there was the year before or the year before that.

Q. You do not know any of the data, but you are willing to swear you got no benefit, notwithstanding the fact

320 that you do not know how much water stood there?

A. Yes, I am willing to say that.

I think it had no effect whatever; if only $1/2$ of the water came down the river last year that previously went under the bridges there would have been no benefit to our embankment in the solidity of the same and in the cost of the maintenance of it; it would make no difference how much water comes down the river unless it should go over the track and begin to wash the bottom out; I stated as a general proposition that when the embankment stood in water it had a tendency to weaken it and make a higher cost of maintenance; this fact is not true at this place and our embankment would stand all amounts of water; there is a peculiar reason why it should.

It is not a fact that we cannot run over that bridge the same class or weight of engines that bring our trains from St. Paul and Minneapolis to Sioux Falls; that bridge would not have to be changed if we wanted to run the same class or weight of engines to Mitchell; my company has not put in any different trestles since this spillway has been constructed; I have been in Sioux Falls several times; I think I was here in 1919; I think I was here in 1917 or 1918, and went over the ditch matter at that time; our former chief engineer had at one time under consideration the question of the shortening of the bridge just east of here; my understanding is that the spillway is designed for 2000 second feet and could take an overload of 500 more, making a total of 2500.

321

(Redirect Examination)

The special reasons why water standing by this railroad embankment did not affect it is that this particular em-

bankment is very wide and deep and very heavily overgrown with vegetation and sod; in the vicinity of the river course where any washing has ever taken place are thoroughly protected by rip-rap; for this reason I believe that water standing along this particular embankment would have no effect on it in so far as the labor that would have to be expended in maintaining the track is concerned; that is the answer that I would make to the claim of benefits made by Mr. Rettinghouse in regard to saving \$100 a year maintenance; my understanding is there has been no decrease in the force employed on the section since the construction of the spillway in 1918 and that would be the determining factor as to saving in maintenance account.

The reason why trains the same as come from St. Paul to Sioux Falls cannot be run to Mitchell is that we have other bridges between here and Mitchell which would not permit of the running of heavier locomotives; the bridge in Sioux Falls is restricted in our time card; we do not permit our heavier engines to go over it at the present time; as a matter of fact there is no reason why the heavy engines that operate down here cannot go over this particular bridge although it is restricted in our time card; there is no reason why the heavier engines should run any further than Sioux Falls if they cannot go clear through to Mitchell; Mr. Rettinghouse the engineer of the drainage district, was the former chief engineer of the Omaha road who had under consideration the question of changing the bridge at Sioux Falls.

C. GEELAND, called and sworn on behalf of the plaintiffs, testified as follows:

322

(Direct Examination)

I am road master of the Chicago, St. Paul, Minneapolis & Omaha Railway from Worthington to Mitchell and from Laverne to Doone, and I have been since August 15, 1905; prior to becoming roadmaster, I was section foreman and extra gang foreman; I was section foreman at Montrose; I started working for the Omaha in April, '80, and was employed by that road during 1881; I remember the flood waters of 1881; I was in Sioux Falls when the water was the highest; I am familiar with that portion of the Omaha Railroad in the City of Sioux Falls and west of the City comprised in the area sought to be assessed for the construction of drainage in this drainage district No. 1 and 2, and have been familiar with it since 1908; there is very little noticeable difference in the

water conditions along that line of the Omaha railroad subsequent to the construction of the new spillway in 1918; I realize that more water has come down and stood on the bottoms, but it spread out such a wide territory across the bottoms that it didn't raise it very much; I wouldn't say that there has been more water on the bottoms west of the city and north of the Omaha Railway track since the construction of the spillway than there was before, but to my knowledge there is fully as much; I have seen the water conditions each year beginning with 1918 and have visited that part of the line and know how much water there was; the water that has collected in the field north of the track does not seem to have had any bad effect, that is, it doesn't seem to make any more particular work across that bottom; I can't say it has a bad effect one way or the other either before or after the construction of the spillway; the construction of the spillway and other works in Drainage Ditch No. 1 and 2 has made no apparent difference

one way or the other as to the flood waters of the river
323 and as to the line of railroad of the Omaha west of the city and east of the river; I can't say that there is any particular noticeable difference in regard to the water conditions at the bridge in the city of Sioux Falls before and after the construction of the new spillway; I am familiar with the course of the river through the City of Sioux Falls and have seen it each year since I have been roadmaster; so far as effects the maintenance and operation of the railroad, the difference is very little; in fact as far as the operation of the railroad is concerned, it doesn't affect the river being a little high or low west of the depot; it never has had any effect before or after the construction of the spillway with the exception of one year, that was 1881; that was the year there was an ice gorge formed in the southeastern part of the city; that gorge held the water back and when the ice gorge broke there was a flood which flooded the track about the location of the present station; the Omaha has never been troubled with water at its station or at its bridge west of the station since 1881.

(Cross-Examination)

I have been familiar with this particular part of the river between here and Montrose since 1880; in my travels back and forth over this road from year to year I have never set any permanent structure to indicate the course of the water at any particular year; when I say that the water is the same now as 5 or 10 years ago, that is the best of my judgment; in 1881 it washed out the whole line; in 1907 the waves had cut down

into the bank and there was some riprap put there for fear it might wash; the water caused us additional expense and maintenance that year; if the water should pile up in the same way as it did in 1907, it would not be necessary to put riprap in again.

324 Q. You say the [heighth] of this water has been practically the same every spring? Were you advised of the fact that from one-third to one-half of the water coming down the valley had been diverted from your railroad?

A. Yes sir.

Q. Still the [heighth] of the water remains about the same each spring as to your railroad track?

A. Not the same every spring.

The [heighth] of the water as to the railroad track varies with each season but is relatively the same; if there should be an increase of 30% to 50% of the amount of water coming down the Sioux River the effect upon the track would be very little, if any; it would not require any more riprap and would stand up just as well as it does now; we would not need any greater flood bridges than we have now; we did need them in 1881 but it was then fixed out there to take care of the flood water we have kept the same amount of lineal feet of flood bridges since 1881 to take care of the flood waters even since the spillway has been put in.

(Redirect Examination)

The riprap which was put in in 1907 was put in on the west spur which is possibly 400 ft. west of the main channel; it was on that branch or spur which runs north of the main line and the water has never since made any trouble; no other riprap has been put in.

325 B. A. WAITE, called as a witness on behalf of the plaintiffs, testified as follows:

(Direct Examination)

I am B. A. Waite of Des Moines, Iowa; am assistant Engineer of the Chicago, Rock Island and Pacific Railway. I have been Assistant Engineer of the Dakota division coming into Sioux Falls frequently. I became connected with the line that runs into Sioux Falls in 1907; from then down to the present time I have been on this division, five or six years, and while I was working in Chicago and in Davenport I worked on this territory part of the time. Am a Civil Engi-

neer, practicing that profession since 1892. Am familiar with the right of way and the bridges and railroad tracks of the Rock Island Railroad within this drainage district. I have here a map showing the property owned by the Chicago, Rock Island & Pacific Railway within the City limits of Sioux Falls, marked Rock Island Exhibit "1". That is a correct blue print representing the right of way, the property owned by the Rock Island Railroad within the City limits of the City of Sioux Falls. The red pencil mark outlines the property owned by the Rock Island Railway.

Rock Island Exhibit "1" is offered in evidence by the plaintiffs and received.

I have computed the number of acres of property owned by the Rock Island Railroad within Drainage Districts No. 1 and 2, and as far as I can tell it is about thirty acres (30) or a little less. There are two bridges on the Rock Island across the Big Sioux River, one two miles east of town and one just north of the depot. The Rock Island comes into Sioux Falls from the southeast, crossing the river the first time two miles southeast of the City. It then comes up the west side of the river into Sioux Falls. It then crosses the river again within the City limits at the foot of 9th Street; that is a spur known as the Bismark spur. The trains do not cross this bridge. The Rock Island station is on the west side of the river on 10th Street. The Rock Island Railway Company has no property within this Drainage District that is used for agriculture and none of it has even been so used. All of its property is used for railroad purposes, location of side tracks, industrial tracks, station grounds, roundhouse grounds and right of way of the main line. The Rock Island has no more property within the City of Sioux Falls or within this drainage area than is necessary for railroad purposes. The first half mile of the track from the east bridge toward the City is about eight feet above the average water of the Big Sioux River and is practically level with the adjoining ground near all the rest of the distance, and inside of the City limits it is above the level of the river about fifteen to twenty feet. That is true throughout the course of the line, except at the east end over the bottom where it is about eight feet above the river. Neither the track nor the embankment of the Rock Island has ever been reached by high water within my knowledge, and neither the track nor the right of way has ever been affected by high water from the Big Sioux River since I have known it. I have here a blue print of a cross sec-

tion of the bridge about two miles southeast of town marked Rock Island Exhibit "2". I have checked the measurements over at this time and it is correct. There is in the center of this bridge a true span made of steel and then it has piled approaches. The approach on the east end is ninety-seven feet (97) and on the west end one hundred ninety feet (190), making a total bridge, including approaches, of four hundred nineteen feet (419). From the top of the tie to the bottom of the river is twenty feet.

Rock Island Exhibit "2" is offered in evidence and received.

327 I also have a cross section of the Bridge at 9th Street inside the City of Sioux Falls marked Rock Island Exhibit "3". This shows the construction of the bridge, with the exception of the pile portion, which has been re-built since that plat was made. The plat was made in 1913 and part of the piling on the east end has been filled in since then. It was filled in gradually, took several years from 1913 to 1915 and the land on either side of the bridge was filled in as we filled in the approach. The shore line has been filled out on either side of the approach so the approach was of no use there.

The exhibit is offered and received in evidence.

In regard to the bridge southeast of town, we have never had any trouble with that bridge from high water to my knowledge, either before or after the building of the spillway. As an engineer I would not dare to fill in any of the bridge or any of the approaches at the present time, because at the present the waterway is no more than would be required according to our way of figuring the waterway required. We figure the drainage area on Dunn's tables and a certain proportion of that is the waterway required according to the area drained, and under such computation we have no more waterway under this bridge than is required for the area drained. The approaches to this bridge have not been in any way affected by the building of the spillway and the spillway has had no effect upon the bridge that I know of.

In regard to the bridge in the city at 9th Street, I understand it is proposed by Mr. Rittenhouse to eliminate one section of that bridge, that is the south or east one hundred ten feet (110) steel span truss. The bridge now is three hundred seven (307) feet long. If that span was taken out the bridge would be one hundred ninety-seven (197) feet long. I

328 would not dare to cut that bridge down to one hundred ninety-seven feet. The bridge as it is now is about the same length as the other railroad bridges on this stream. I believe that they have two one hundred foot (100) spans, and if we eliminate one hundred ten (110) feet this bridge would be shorter than the other bridges. This bridge on 9th Street was raised by the Rock Island before I came here. This span that is contemplated to be eliminated by the drainage engineer is filled in about half way. There is no water under it at the present time, the current is under the other end of the bridge. This was caused by the building out of approaches and drive-ways, pushing out the shore line. The spillway has nothing to do with the filling of this river on either side. It has been caused by the buildings being extended towards the river. There is at the present time a garage known as the Homan Garage directly west of this span in the bridge and extending out at least half of the length of the approach, so that a line from the warehouse on the east side of the bridge to the corner of the garage would strike the middle of this span. I would not consider that it was reasonable engineering to eliminate any of this bridge. Since I have known this property the water of the Big Sioux River has never been over any of the track in any place, and I have known it since 1907.

(Cross-Examination).

It is twenty feet (20) from the rails on the bridge two miles south of town to the bottom of the river. This bridge was built in 1886. Either this bridge or replacements of it. Since 1907 it has been in the same condition. I have never compared this with the Great Northern Bridge down the river. I have never observed this bridge at extreme high water. From the area of the waterway required I would say that none of the approaches to this bridge could be filled in. I asked Mr.

329 Kittenhouse in regard to the waters shed in this drainage area, and I think he said it was 4500 square miles.

This was the whole watershed. I do not know the slope of the land from north to south per mile. I do not know the velocity of the water, but from our rules we could not reduce the length of the bridge. The steel span in the center is 127 feet with pile approaches. These piles are treated and should last 20 to 30 years. We do not know just how long creosote piling will last.

I said that one of the approaches to the bridge within the City had been filled in gradually along about 1914. It has not caused us any trouble since then. Where the filling is there was formerly a trestlework. Under the present condition of

the river since 1914 it has not been necessary to have as much approach to the bridge as when it was constructed. The shore line that I spoke about from the Homan Garage to the warehouse, that is in a bend in the river. I do not know the difference in elevation of the two bridges and I do not know the velocity of the water at either one of them.

Q. And still upon this information that you don't seem to possess as to the fundamentals as to how much water this river carries, the slope of the land, or the difference in the [heighth] of the land, you still wish to be understood that it would not be safe, in your judgment, to shorten these bridges?

A. Yes sir.

I do not know what would be the effect on the bridge here in town if the amount of water flowing down the river should be increased thirty to fifty per cent. I think the one east of town would be all right, but I am not sure about the one here in town. The high water has never reached our embankment that I know of. I do not believe that the water has ever crossed our right of way. I do not remember of it. I

have not been here very often for the last year, once before in the last six months, but have been here before.

My headquarters are at Des Moines. I have been here at high water periods. I could not tell you just what year, but I have been connected with this end of the railroad intermittently. I could not remember the year that they had high water when I was here.

(Redirect Examination.)

In regard to the filling in of the piling on the bridge in the City known as the Bismark Spur, the land adjacent had been built out to the end of the piling so there was nothing but dead water that stood under it. The water could not flow under the piling on account of the land having been filled in on each side.

C. E. DEAN Called as Witness on Behalf of the Plaintiffs
Testified as Follows:

(Direct Examination.)

I live in St. Paul and am a bridge foreman on the Chicago, Rock Island & Pacific. I am a bridge foreman upon the division running into Sioux Falls. I began work here in the fall of 1893 and left this division in 1913, so that from 1893 down to 1913 I have known this railroad running into the City of Sioux Falls, with the exception of the years 1905, and 1906,

when I was with another railway. From 1893 to 1897 I was a bridgeman. From 1897 to 1905 I was bridge foreman, and from 1907 to 1912 I was master carpenter on this division. I was familiar with the two bridges on the Rock Island within this drainage district at the time I was here and down to 1913. I remember when the bridge across the Big Sioux at the foot of 9th Street in the City of Sioux Falls was raised. It was raised about four feet on the two spans, but the old approaches were left alone. That was just before or about the time of the breakup of the ice in the spring. We contemplated

331 a flood. The report came that there was an ice gorge up the river, we expected it to break loose and have heavy water. It had been a hard winter and the ice was heavy, but it did not materialize. We had no trouble from it. The bridge was lowered a little after that, but not put back where it was originally. I think the permanent raise was about two and one-half feet and the ends dropped down to their original position. During the time that I was on the division we never had any trouble with the bridge southeast of town. I was here in 1907 when the spillway was put in, was master carpenter. I never have noticed any perceptible change in the condition of the water flowing under these two bridges before or after the building of the spillway. I have no record of high water marks myself. The building of the drainage ditch and the spillway has never benefitted these bridges in any way that I know of. From an engineering standpoint I cannot say but from a practical standpoint I would not fill in either of these bridges at the present time. I base my opinion upon the fact that the engineers as a rule do not give enough waterway. I have taken many an opening—for instance—four foot opening I put in once on the engineer's orders and afterwards had to be a seventy foot opening. During the time that I have known the Rock Island property within the City of Sioux Falls the railroad track has never been under water. The water has never been up on the embankments at any place to my knowledge.

(Cross-Examination.)

I was here in the high water of 1911. There was no damage that I know of. I have not been here at any other time of high water except in 1897. I have never made any definite measurements of the water in the river. I do not know the amount of watershed that the river and the ditch drain, I do not know the elevation of the land from our right of way north and I do not know how fast the water flows. I do not know the amount of water that comes down the river, or that

332 comes down the drainage ditch. If the water was increased fifty per cent I do not believe the bridges would stand it. The present bridges represent the same length of span that was here in 1893. Only the spans have all been renewed. There have been piers put in. The piles we are using now are creosoted piles. Piles not creosoted last about ten or twelve years, and this is true of hard wood culverts.

S. O. PERKINS, called as a witness on behalf of the plaintiffs Testified as Follows:

(Direct Examination.)

I am an inspector on the Rock Island Railroad. I have been connected with the bridge and building department as bridge foreman and master carpenter. I was master carpenter on the division running into Sioux Falls from January 1, 1913, to June 1, 1920. During that time I was familiar with the two bridges on the Rock Island in the City of Sioux Falls. During that time there never was any high water that damaged or threatened to damage these two bridges in any way. The water has never been upon the embankment of the right of way of the Rock Island at any time to my knowledge. I have worked upon these bridges more or less. As a bridge man I would not think it safe or advisable as a railroading proposition to fill in any part of these two bridges. From my experience I have been obliged to put in several larger openings at different points where we have had similar openings. We have had to increase the length of the openings on account of high water, and I would not think it safe to close up any of these openings.

333

(Cross-Examination)

I do not know the number of acres of watershed drained by this ditch or by the Big Sioux River or the elevation of the land or the excessive or average rainfall for a year in this drainage district, and I do not know the capacity of the spillway to take care of the water from the ditch, but I want the court to understand that these spans could not be safely shortened. That is based upon the fact that several times I have had to make openings larger and that is the foundation of my testimony.

A. F. PILCHER Called as a Witness on Behalf of the Plaintiffs testified as follows:

(Direct Examination).

I am general agent of the Rock Island Railroad at Sioux Falls. Have been here since June, 1890. I was the agent of the Rock Island until 1914 and since then the general agent. I have been familiar with the property of the Rock Island within this drainage district for thirty-one years. The Rock Island has no property within this drainage district that has ever been used for agriculture and none of it is used for agriculture at the present time. It is all used for railroad purposes, roundhouses, stations and railway tracks. It has no land that is not necessary for railroad purposes at the present time. The right of way and the rails upon the track in the city are about 20 feet above the water in the Big Sioux River at ordinary times. Two miles south of town, at what is known as the Cherry Creek bridge, they are about eight feet above the water. The right of way has never had any water standing on it in the Big Sioux River since I have known it, that is since 1890. None of the roadbed of the railway has ever been washed by the Sioux River. There has never been any difficulty with the bridge southeast of town in handling floods. In regard to the bridge at the foot of 9th Street in the City, in 1897 there were rumors that an ice gorge had formed and as a precautionary measure we raised this bridge at the foot of 9th Street but we found out it was not necessary. The high water did not develop. The Big Sioux River has never been out of its banks here in the City of Sioux Falls since 1890.

(Cross-Examination).

I live in Sioux Falls and worked for the Rock Island Railroad Company in 1916, 1917 and 1918 and at that time knew about this new ditch going in. I saw the publications in the newspapers. I knew it was being constructed. I went over to the spillway and saw it in the course of construction. I know of no reason why the land of the Chicago, Rock
334 Island & Pacific Railway Company could not be used for agricultural purposes if not covered with the railroad tracks. It has agricultural land as a basis.

C. M. BASSETT called and sworn on behalf of the plaintiff testified as follows:

335

(Direct Examination)

My name is C. M. Bassett; I live in Sioux City; I have been a civil engineer 24 years; I am assistant engineer of the

Great Northern Railway Company; I have been in its engineering department 9 years; at the present time I have jurisdiction of the entire Sioux City Division, including all of Minnehaha County, South Dakota; I have been in charge of that Division since the spring of 1916; during that period of time I have made frequent trips to Sioux Falls, and over the lines throughout Minnehaha County; for two years 1916-17 I was in Sioux Falls practically all the time; since then I have been here practically every week. I am familiar with what is known as drainage ditch Number 1 and 2, and the spillway; I am also assistant engineer of the Watertown and Sioux Falls Railroad Company; its line is located along the ditch for about $3\frac{1}{2}$ miles; every spring I have been to the spillway; then I have been over the entire line of the ditch and looked at the various head-works and retaining dams; the line of the Great Northern enters the city of Sioux Falls from a northeasterly direction at a point about a mile and a half from the mouth of the spillway; that is the nearest point on the line of the Great Northern to the mouth of the spillway; the course of the line of the Great Northern as it goes through the city of Sioux Falls and around south of the City and down through Section 31 is as follows: We enter in a northeasterly direction and then through town we go practically north and south and then we swing southeasterly towards Yankton; Exhibit 1 is a plat I prepared or caused to be prepared, showing the location of the line of the Great Northern over the area referred to and the general location of a portion of drainage ditch Number 1 and 2 and the location of the bridges along the line of the Great Northern within the area referred to; the plan is drawn to scale, 1 mile to the inch.

Plaintiff offered and there was received in evidence, Great Northern Exhibit 1. It is as follows:

337

The acreage of the right of way and station grounds of the Great Northern Railway within the area in question, Sections 16, -27 and 31, Township 101, Range 49, is 27.14; the acreage of the station grounds included in that is 6.09; tract 11 consisting of approximately one and one half acres is not included within the 27 and a fraction acres; tract 11 lies at the north end of our bridge 146 and on the west side of the main line; it is between the Omaha and Great Northern rights of way and the Milwaukee is on the north; it is just south of Tenth Street; it would be on the Eleventh Street if it were extended out; it is an irregular tract; it was originally purchased for station grounds and is part of the station grounds of the Great Northern; it is bounded on the east by our grade; on the north, the Great Northern and Milwaukee connection; on the west the Omaha grade and on the south the river; the tracts of the various railway companies bounding it I would say are about ten feet above the natural surface of the ground; tract 11 has never been used for agricultural purposes; I would not consider it agricultural land; it is not accessible; it is bounded by the river and three railroad rights of way on there is no road into it; no one could get into it to farm it; it is not feasible for that purpose. I am familiar in a general way with the channel and banks of the Big Sioux River from a point near our bridge in the city of Sioux Falls; the North bridge down to and through Section 31; to the south of town the banks of the river are well defined; there is a deep channel there and the river is confined to that channel, through town there is a

greater chance; the channel is wider and the banks are
338 not so steep; as you go further north the channel again deepens and it is confined, the valley is narrowed considerably south of town; I am acquainted with Mr. Rettinghouse; I had a conversation with him in reference to the manner or basis upon which he based his opinion and report to the Board of County Commissioners with reference to the alleged benefit to the right of way, bridges, tracks and embankments of the Great Northern Railway from Drainage ditch No. 1 and 2 and the spillway in question; the first conversation with him was in early spring of this year; the last one was about ten days ago, I think it was last week; during the first conversation Mr. Rettinghouse stated that he had figured we could shorten our bridge and had figured out the cost of renewing those and the cost of filling and made deductions and based his figure on that amount capitalized at

seven per cent, and divided by twenty-five per cent, was what our assessment came to—the number of units.

“Q. In your conversation approximately ten days ago, did he go more into detail with reference to the subject?

A. Yes sir.

Q. State the substance of that conversation.

Objected to as not binding upon the defendant commissioners.

Overruled.

A. We have two bridges within the area, and he stated bridge 150-7 that that bridge was about the right size, and bridge 146-0 we could shorten approximately 323 feet, and that he had capitalized that amount, but I didn't get the exact figures, and figured on the amount saved by the shortening of the bridge.

339 Counsel.

At this time, if the Court please, the defendants object and ask that the question be stricken, and objects to the testimony of this witness on behalf of the plaintiff company, and to the proposition of whether or not the plaintiffs are benefited or not, or the extent thereof, by the drainage project, for the reason the same is incompetent, irrelevant and immaterial to any of the issues in this case, and for the reason that the evidence now shows that the Board of County Commissioners of Minnehaha County had jurisdiction in the said matter in these proceedings, and proceeded with the construction and repair of the ditch in question. For the further reason that this Court has no original jurisdiction of a bill in equity to reject or control proceedings of the Board of County Commissioners of Minnehaha County in the construction or reconstruction and repair of this ditch. And that the plaintiffs have a plain adequate and complete remedy at law, by appeal from the equalization arising from the proceedings taken by the Board of County Commissioners. For the further reason, it calls for evidence of a fact, the determination of which is in the exclusive jurisdiction of the Board of County Commissioners, and has been decided by that tribunal, which decision is conclusive and cannot be inquired into by this Court. That it is an attempt to impeach the determination of that tribunal in this action, and with no allegation or proof of fraud or arbitrary action on the part of

that tribunal. Is not within the issues of the case and not a proper subject of inquiry in these collateral proceedings, and does not present a federal question.

May we have the record show that that objection goes to the testimony offered in behalf of the plaintiffs in these proceedings attacking the question of whether or not they are or are not benefitted by the ditch proceedings?

340 The Court: Yes, the motion is denied. The testimony is received subject to objection.

Mr. Rettinghouse made no statement to me with reference to any other element of benefit to the Great Northern Railroad than the shortening of the north bridge within the city limits; basing my answer upon my knowledge of drainage ditch No. 1 and 2, the spillway, the location and construction of the tracks, bridges and embankments of the Great Northern Railroad Company, and my knowledge of the waters in the Big Sioux River; in my opinion no benefit result to such right of way tracks, bridges, embankments or station grounds from drainage ditch No. 1 and 2 including the spillway; no part of the right of way, tracks or bridges within the area in question to my knowledge have ever been flooded by the waters of the Big Sioux River; we have a plan drawn up for a new steel bridge at bridge 146 which provides for shortening of fifty feet of that bridge and putting in deck girders which are much lower and nearer the water; we considered that owing to the fact that we are lowering the steel we would have to provide practically the same opening we have there now; in planning to shorten the bridge fifty feet we did not take into consideration the existence of the drainage ditch; the present height of the track on this bridge above what I understand to be the high water mark of the Big Sioux River, according to our best record is eleven feet; if I were planning to construct new the bridges in question on the Great Northern, or to rebuild them, in determining the sizes of the openings from an engineering standpoint, I would not take into consideration the existence of drainage ditch No. 1 and 2, because my observation has been that before when the spillway went out in 1916, and the water conditions have been just the same; I consider there is great danger as the spillway is constructed now of its going out, and there is danger that they will have to close the ditch and turn the water back into the original channel; I would not take it into consideration even if the ditch and spillway were working at capacity; I don't think

341 it takes enough water out of the river to make any material difference; I would plan new openings without considering the ditch and considering the highest possible water in the river; I would consider it bad engineering to plan otherwise.

I observed the flood waters that entered the ditch coming out of the ditch north of Sioux Falls and re-entering the Big Sioux River; on the Watertown and Sioux Falls we are flooded every year just south of the city pumping plant at the top of the hill; the water comes out of the ditch and goes over our track; it has every year I have been here; we have probably over six inches over the top of our track; the water stands in there, sometimes for probably ten days on the Watertown and Sioux Falls line.

The length of the north bridge is 615 feet; I do not think it would be good engineering or safe for us to shorten that bridge more than fifty feet under any conditions; as I have stated, for some period of time we have contemplated the construction of a new bridge and of a different type, and shortening it fifty feet; as constructed at present the bridges are supported by a truss above, and in contemplating the new construction we had in mind what we called a deck girder, and that support is below the rail which makes a difference; our plan will be to lower it five or six feet due to the use of deck type girders instead of the truss now used; in planning this new bridge we did not take into consideration the possible effect of the drainage ditch.

(Cross-Examination)

When we lower five or six feet, the girders I have mentioned which are in the nature of I beams probably five feet thick, will still be underneath the track; the elevation of the track would remain the same as the bridge work is all underneath the track; from my observation I say that during the last five years the water from the south bridge and north to the termination of our line in the city has remained
342 about the same; during this same time the water has been high enough up around the penitentiary where the Watertown track goes to flood its tracks some inches of water every year; the water that came over the Watertown & Sioux Falls came out of the ditch; I have been told and know approximately the amount of watershed in this drainage project; I couldn't say off hand how much it is; I haven't the figures with me; I do not know how much water really falls in the watershed when we have high water here; I know

generally the topography of the country north of Sioux Falls through which this water is collected and conveyed by the river and ditch south; I have been pretty well all over it; I do not know the number of cubic feet of water the river carries per second when it is banked full at flood time, nor the whole capacity of the ditch and spillway; I was up there when they were building the spillway in 1917 and have been watching it; I didn't like the construction; I saw them repairing the ditch on north and throwing up embankments on either side; I am still of the opinion that the spillway isn't what it should be; I have seen it every year since then; I know of no reason why if the tracks were not upon the right of way and station grounds, those premises could not be used for agricultural purposes, except our station grounds which are right on top of rock; Section 31 and 27 could be used; Tract 11 I don't think has any soil to amount to anything on it; the bridge south of town is 304 feet long and takes care of the water; the bridge in town is 615; since I have been on the division there has been no new bridge put in; these bridges have been constructed for some years and before the spillway project was put in; I judge that they were put in to take care of the water that came down the Sioux River at the time; the water has come out of the ditch every year since the spillway was put in; north of the city at level siding 343 the water has come out of the ditch over the tracks of the Watertown & Sioux Falls Company right at the city pumping plant; it comes through the dikes in the ditch.

(Redirect Examination).

Along the right of way south of town we have an embankment about 1800 feet long; bridge 150-7; it is about 16 feet deep; side slopes approximately one and one half to one, approximately fifteen feet high; the toe is protected in some places with rip rap, and it is now overgrown with grass and weeds; that embankment is so constructed as to withstand any possible flood condition in this neighborhood.

THOMAS SIMPSON, called and sworn on behalf of the plaintiff, testified as follows:

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(Direct Examination)

My name is Thomas Simpson; I have lived in Sioux Falls twenty-seven years; I am general agent of the Great Northern Railway Company at Sioux Falls, and have been its agent for twenty-seven years; I am familiar with the line of the Great

Northern included within the area in question here in Section 16, 27 and 31; during such twenty-seven year period no part of the tracks, bridges or right of way of the Great Northern Railway within that area has been flooded; we have had no trouble during that period of time from high water; the station of the Great Northern is east of the river; I have lived on the west side of the river twenty-seven years; the depot has been located where it is now approximately fifteen years; during that time I have crossed the Big Sioux River several times a day and I have not observed any appreciable difference in the flow of the Big Sioux River before and after the construction of the spillway.

(Cross-Examination).

During the time referred to in my testimony the height of the river has fluctuated, but there has been no floods; the height during flood periods has been at about the same level; I do not know how much water the spillway takes care of or how much the river banks carry; I heard about it when they put in the spillway.

345 ANDREW NELSON Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination).

I am section foreman for the Chicago, Milwaukee & St. Paul Railway between Baltic and Renner. Renner is six miles and Baltic fourteen miles north of Sioux Falls. I have been section foreman there twenty-seven years and was foreman in 1916. There is a place on my section where the drainage ditch is just outside of the right of way. I think they diked it there four feet just outside of the right of way. From a point four miles south of Baltic the ditch is on the west side of the railway, and from that point down to Renner it runs close to the track. The Ditch runs between the railroad and the river and the ditch and the river are both on the west side of the track. In 1916 at a point four miles south of Baltic the dam went out of the river and the river let the water in the ditch. The ditch couldn't carry the water and it went over the bank and washed the dike out, and a few miles further south it washed the track and let all the water out over the farms around. It flooded the farms around there and washed back on the track. This water came from the ditch. The ditch is constructed with a dike and the water broke through that dike. Before the water came out of the ditch

there was no water east of the track. The water came into the ditch and went out of the ditch and washed all the track out and flooded the ground. The water in the ditch came from the river. I did not have any trouble with the water in 1919 and 1920. It came out of the ditch at several places, but not enough in those two years to hurt the track. In 1919 and 1920 the water came out and went up to the track and the
346 ditch was full of water. It came to the bottom of the railroad track but didn't cut in much or wash. At the time the water came through and flowed up to the top of the bridge there was no water east of the railroad track. There was no flood water between the ditch and the river until the water ran out of the ditch. It ran out of the ditch and filled up between the river and the ditch too. It went over the dike on the west side of the ditch. The origin of that water was the river. In 1916 the water remained on the [—] that were overflowed about ten days or two weeks. In 1919 and 1920 it stayed over two weeks. It stayed a little longer in 1920 than in 1916. The point at which the ditch protects the track is about a half mile south of the Thompson bridge. The ditch comes to the right of way at the Thompson bridge and runs nearly four miles down the track. The water comes in the ditch where that bridge is built. There has always been a bridge there. They built a cement bridge there a year ago. It is a highway bridge. At the point where I said it washed out we had to put in [riff raff]. We had to build a bridge there temporarily and afterwards we filled it with [riff raff] and it is [riff raff] now.

(Cross-Examination).

The water will wash the track out the way the bridge is put in there. The water in 1916 washed out part of the track but not at the place where the bridge is. That was the year the old spillway went out and there was high water that year. I have no idea of the amount of rain or water that was carried by the river or the ditch in 1916, 1919 or 1920. In 1897 the track was washed out south of Renner. In 1916 the water did not cover the abutting lands before it went through the track; then it covered all over the east side after it got through the track, but it did not cover half as much ground as it did in 1897; if the dikes were raised a foot or two they would keep more water in than they do now; our track was not injured in 1920.

347 NELS OLESON Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination)

I am section foreman for the Chicago, Milwaukee & St. Paul Railway Company. I started in 1887 as a laborer. The most of the time I have been employed as section foreman I worked in the yard five miles south of Sioux Falls. I have been continuously living here and working for the railroad company since 1887. I have not noticed any injury to railroad property or to railroad property covered by waters from the Sioux River south of here during that time, and none in Sioux Falls. I do not know of any water doing any damage on J. L. Phillips' Addition and on the Millspaugh's Addition near the roundhouse, or east of the roundhouse, or north of the ice house. I do not know of any flood waters doing any damage to railroad property since I have been here. There are five tracks in the new yard in what they call Daniels' Addition and Millspaugh's Addition in the vicinity of the ice house east of the depot. I do not know of any damage being done there. There has been no interference with any of these tracks by the waters of the Sioux River since I have been here. There has never been any difficulty or damage on account of the flood waters at the roundhouse property.

(Cross-Examination).

The ice generally comes down in the spring and goes over on the east side and over the rocks there. There is a current through the east side of the channel of the river and it lifts the ice right around the roundhouse. The water comes close to the roundhouse but never does any harm. It does not come out to the banks by the ice house very much. I never saw water standing in the ditch alongside the track on the ice house side.

348 "Q. You don't know, Mr. Oleson, whether or not the amount of water that has been gathered into the Sioux River and the ditch above Sioux Falls in the past five or ten years has increased or not, do you?

A. I couldn't tell you about that.

Q. And so if there is twice as much water coming down this valley as previously came down, you couldn't say that was true or not?

A. If the water raised five or ten feet I could tell.

Q. You don't know the actual amount of water?

A. No, I don't know nothing about that."

WILLIAM SHEA Called and Sworn on Behalf of the Plaintiff
Testified as Follows:

(Direct Examination)

I am general road master of the Chicago, Milwaukee & St. Paul Railway Company, and have been such about four years. Prior to that time I was district general road master and division road master. I have been in these divisions for the railroad since 1890. Prior to that time I was track laborer and section foreman and construction foreman. We have many miles of railroad built across river bottoms and creek bottoms where we have to maintain grades that will guaranty us that we can operate our railroad during high water. The Chicago, Milwaukee & St. Paul have many lines upon which heavy traffic is carried upon which they have tracks to maintain under such a situation. I have been over the line between here and Baltic and have noticed the material of which the grade is constructed. From what has been my experience and observation I would state that adjacent water standing alongside of and extending against the grades has no effect upon the maintenance of the grades or the stability of the track upon it, for the reason that we used our track embankment in many cases as the bulkhead to our reservoirs of water for engine supply. We do not hesitate to use our track bank for that purpose. We have many of them on our railroad and we do not notice that we have any bad results from it.

349 No additional expense of up-keep is occasioned by that situation on embankments twenty years old or over.

We prepare our property for the purpose we are going to use it for by building up a track bank. In this particular instance, it would cost from \$800 to \$1,000 an acre for us to build up the track bank and make the line serviceable for our purpose, which in this case is about what that cost up there. I do not believe the farmers ever went to any expense worth mentioning in that community to prepare their properties that way. I didn't notice anything of the kind. The overflow upon this embankment or alongside the embankment would have no effect whatever upon the railroad bridge. If the flood remained two or three, or five days, upon the adjoining agricultural land I think it would ruin their crops.

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(Cross-Examination)

It would cost \$800 to \$1,000 per acre to prepare our right of way for railroad purposes, and if the embankments would wash out it would cost something like that to replace it. It has not been our experience in washouts that the damage to the right of way of the railroad would be greater than it would be to the farm land. When the water goes over it gen-

erally breaks through the embankment and cuts out a short piece, or whatever is necessary to carry the overflow of water from one side of the track to the other. After the water would get over our track it would not take our entire roadbed out, just break through and make openings similar to the kind we have in other places known as arches. It would not necessarily take out our entire embankment. Yes, when this embankment is taken out and is washed away it does hold up our traffic and cuts off our income during that time just the same as the farmers. It costs about twenty-five dollars a cubic yard to put the dirt back in the washout.

I am familiar with this branch of the railroad running north and going through the drainage district. I pass over it and inspect it in different ways three or four times a year. We have had no washouts for the last four years, other than that the water got up on the track in 1919 and 1920. This [—] didn't come over the track but it got very close to it. We possibly delayed our traffic. I came over on this line in 1918.

WILLIAM E. WOODS Called and Sworn on Behalf of the Plaintiff Testified as Follows:

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(Direct Examination)

I am assistant district engineer of the Chicago, Milwaukee & St. Paul Railway and have been in the employ of that company about thirty years in the engineering department. I am familiar with the lines of the Chicago, Milwaukee & St. Paul Railway described in the notice of assessment published in the Daily Argus Leader dated July 13, 1921. None of the land of the railway company is used for agricultural purposes. The width of the right of way is usually one hundred feet, being 50 feet on each side of the center line of the main track. We have a little piece of right of way in Sioux Falls 50 feet wide, being 25 feet on each side of center line. There is approximately 198 acres of right of way in the drainage district, none of which is agricultural land. I am acquainted with the lands described as Lots 13, 14 and 15, of Block 28 of Millspaugh's Addition to Sioux Falls. That property is near the ice house property south and east of the town. It is used for new yard tracks. The main line lies between the trackage of this yard and the river. These tracks are lower than the main tracks. The main track was built in 1879. It has never been disturbed by high water. It remains in the same position as when originally constructed. Block 9 of Daniel's Addition to Sioux Falls is just east of Millspaugh's Addition and

us used in the same manner. Lots 5, 6, 7, 8 and 9 in Block 25 of J. L. Phillips' Addition to Sioux Falls is used for roundhouse and ice tracks and turning table. This property is situated on the west bank of the Sioux River about 18 or 20 feet above the surface of the water.

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(Cross-Examination)

The Chicago, Milwaukee & St. Paul Railway Company have 198 acres altogether in the drainage district. That includes what is known as the right of way of the north branch and also includes same going south. A very small portion of that 198 acres is taken up by the roundhouse grounds and the yard out near the ice house. The most of it is right of way. If there were no railroad through the most of it it could I presume be used for agricultural purposes.

A. G. HOLT, called and sworn on behalf of the plaintiff testified as follows:

(Direct Examination)

I am assistant chief engineer of the Chicago, Milwaukee & St. Paul Railway Company and have held that position about eight years. I am a civil engineer by profession and have been connected with the railroad company in a professional capacity about thirty years. I am familiar with and have made a study of the matter of locating lines of road. In turning the line of road from one point to another the character of the country generally determines or controls the location of the line. In locating a line of road through the Sioux Valley an engineer would necessarily have in mind as one of the elements the cost of construction. He would have in mind the height of embankment to be constructed and maintained on account of flood waters. That would be an important feature. In making a location it is a part of the duty of the locating engineer to find out the height of the flood waters of the various streams he crosses. The grade line is usually established with reference to the high water. The engineer gets as much information as he can in regard to the elevation that the high water reaches in the valley. He gets the information partially from the people who live there and partly from his observation of high water marks as they are shown on trees and washes in the sides of the valley. He then determines largely the height of the grade from past experience as indicated by the information he has received. In determining the openings and bridges the engineer makes what is called a ravine section. That is a chart showing the

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elevation of the valley. Then on this chart he shows the elevation of the high water and from that he computes the size of the bridges and the openings, that will be required to carry that water. There are certain rules adopted by railway companies upon which these computations are made, and they are made as an engineering proposition. I have recently examined the territory put into the drainage district. In locating a new line of railroad through the Sioux Valley occupying the place where the Milwaukee railroad now has its track you would have to take into consideration the fact that the drainage ditch was there. You would have to provide a bridge to span it. In providing the openings in bridges and other provisions in the line for overflow of water I would not make any deductions on account of that ditch, because I would figure that at the time of the flood the entire valley would be covered with water and this ditch would be simply a wrinkle in the valley. When the flood waters were the highest they would cover the ditch up.

(Cross-Examination)

I do not know the amount of cubic feet of water the river carries per second. I do not know the cubic feet per second the ditch carries, yet I think the ditch is a wrinkle. In computing the spaces I have testified about which I would make for a bridge, I do not think the speed of the water in passing a given point would make any difference if you had a high water mark that was dependable. If subsequent to the time I had that high water mark something was done to increase the speed of the water in passing a certain point I would have to take that into consideration.

It is stipulated that the mileage of the Great Northern within the drainage district in question, to-wit: Sections 27, 16 and 31, is 3.04 miles.

It is stipulated that the mileage of the Rock Island Railroad within Minnehaha County is 4.3 miles and within the district sought to be assessed 3.5 miles.

THOMAS HARDIMON, called and sworn on behalf of the plaintiff, testified as follows:

(Direct Examination)

I have lived in the City of Sioux Falls since April, 1879. I am a member of the City Commission and am in charge of the roads, streets and highways of the City. I have been a City

Commissioner of the City of Sioux Falls for nine years last October. Since 1879 my occupation has been constructing and road work a great deal of the time. Some of the time I have done bridge work on railroads. I was in Sioux Falls in 1881 at the time of the big flood. There was an ice gorge out on the south side right over where the bridge runs on the Coats farm. When it came through the City it took all the bridges but one and swept up the mills and lumber yard on the east side. The only thing left on the east side was the Omaha railroad bridge. With the exception of that flood which was caused by the ice gorge there has never been any high water since I have been here that has done any damage to the property of the City. The Coats farm is about two miles southeast of here. I think the west line of the farm is in the neighborhood of Eleventh or Twelfth Avenue. It is probably eighteen miles from the spillway following the course of the river around. I am familiar with the topography of the channel of the river from Sherman Park down through the City. As you leave Sherman Park the most of the shore line is fairly level on one side. On the other side it is higher and goes up further from the river. For several miles there is a high plain on the right hand side as you go down the river. The banks on the left side are fairly high too in places.

355 From the time you leave Sherman Park until you get down below where the ice gorge formed in 1881 you have a very decided embankment on each side of the river. The river through the territory I have mentioned is much narrower than it is up above Sherman Park. The ice gorge at the Coats farm held all of the water that collected there, except what ran in the channel until the ice gave way. It gorged different places there. It kept creeping along there for probably two or three days before it came down here. The waters did not spread out on either bank of the river. There was no gorge close to the neighborhood where the Milwaukee roundhouse is now in 1881.

I was here when the Great Northern bridge was built that crosses the river about Seventh Avenue and worked on that bridge. During the past nine years my duties in regard to city property have been overseeing it and attending to it, and also attending to the bridges across the river through the City and matters of that kind. From the experience which I have had during a residence of over forty years here I should say the results would be very unsafe of narrowing the bridges and lowering them in case of extra high water. This would be on account of the volume of water, and in case of ice gorges

would leave it too narrow underneath. If a flood took one it would probably take all of them and form a gorge.

The east side of Sioux Falls is thickly built up with business places, wholesale places and residences, lumber yards, and institutions of that kind. The City pumping station and the City electric light station are situated half or three quarters of a mile north of First Street. The pumping station is south and west of the spillway. The electric light and water plant is south and west of the pumping station. The spillway runs to the north and east of our property. The water
356 plant and the electric light plant are a little north and west of the Penitentiary. I observed conditions of the water around the electric light and water stations during the years 1919 and 1920. I was up there on different occasions when there was any danger or any prospect of water. My official duties required me to be there and investigate those things from time to time. The water around the City electric light plant and pumping station was greater in 1920 than it was any year prior to that excepting 1881. I do not remember so much about it in 1919. We were up there quite a number of times in 1920. When we went in there the water was over the tracks of the two railroads there and there was also a flood down almost to Russell Street and from there down to Covell's Lake. The high water subsequent to 1881 has done no damage to speak of that I know to the City property in the City of Sioux Falls. The water went over Minnesota Avenue in 1920 but not enough to amount to anything. It took a few loads of cinders to patch it up. I never saw the water on the West Sioux Falls road, with the exception of 1881, any higher than it was in 1920. Each street there is two and one-half or three feet above natural ground. In 1920 it went up to just about where it could go over. Then the bridge there carried it down to Covell's Street bridge and it flowed away. Phillip's Park runs along the east bank of Covell's Lake and goes up very abruptly to the east, all except a little piece down at the First Street bridge. There is a little corner there that is a little low, but the balance of it runs up to the east and slopes quite sharply. It has some fruit trees and some other trees on it and has been terraced up in the shape of a park. It is quite broken and is not agricultural land and is not used for agricultural purposes.

357 Sherman Park is very low and all timber and is in where the river bends around considerable. The west side runs quite flat but the east side goes up very abruptly. No part of Sherman Park is agricultural land. Sherman Park

overflows pretty nearly every year. The bed of the stream forms a circle in the Park for probably three quarters of a mile. I do not know that the spillway and these ditches have ever been of any benefit to city property. It is pretty hard to state whether or not the spillway materially [effects] the flow of the water through the City, because when the water is high it overflows a lot which comes down in the spillway and almost directly east of the pumping station. Then it comes out through a little ravine and into Covell's Lake and finally into the river.

The City has a park known as Lien's Park near where the spillway empties into the river. It has practically put the park out of commission. The water practically keeps it covered and washed out considerable. There has been an attempt to rip rap or dam it up, but it has been of no avail. That condition did not exist prior to the establishing of the spillway.

In the City pumping station and electric light plant there are five wells, four of them are 25 to 50 feet in diameter. The last one is U shaped and is 16 feet. The furthest one west is close to a mile west of the station. The City has a piece of ground that surrounds the well directly north of the pumping station. As I remember, there are about twelve acres in it. It is planted to young willow trees. Well No. 1 is located on this tract and well No. 2 is right close to it and directly west. Then follow each well after that up to No. 5. It is probably 30 or 40 rods running east and west at right angles west of the road. The tract is enough as the population of the City increases from year to year for the establishment of
358 additional wells as the needs of the people require.

All of the property other than I have described, that is the three parks, the City pumping station and the electric light station, that is included in the assessment is the streets.

(Cross Examination)

There was high water in 1920.

"Q. Did you not testify in the case of Gilseth vs. County Commissioners, that if this ditch had not been reconstructed and the river had been permitted to take its then course
359 over the bluff it would have destroyed the waterworks of the City? A. It might."

The water was high twice that year; in the first place when the spring rains came and the snow went off, and then along

about the first of June there was a heavy rain in the neighborhood of Flandreau that reached us a few days afterwards.

"Q. And the water was so high that year that it contaminated the city wells and it was necessary for your department to place certain notices in the city papers, in which you informed the patrons of the water company that they should boil all water before using it?

A. The commissioner of water might have done that. Never anything of that kind came before the Board that I know anything about.

Q. As a matter of fact the water did come into the wells in 1920, surface water?

A. I don't know. I would not want to say one way or the other." The city owns a plat of land known as Sherman Park within the drainage area, it is owned and kept by the city for park purposes; it is practically overflowed every spring; I do not recall whether it was overflowed in the spring of 1921; I was not there that spring; the water does not need to get up but a little ways because the land is very low; the river forms the letter S just around it. Possibly anything that tends to divert a portion of the water that comes down the Sioux Valley and keeps it out of the river as it goes through Sherman Park would be a benefit to that park; there is none of the Covell's Lake Park, excepting a little piece of ground just by First Street Bridge, that would be overflowed; I do not think the water would cover one whole lot; we have 125 miles of street, and some of them cost more for up-keep and some of them cost less; I think the up-keep would be somewhere in the neighborhood of \$100 per mile; in 1920 during the high water, the water came up on the [wides] of the West Sioux Falls road, but didn't cross it; the roadway is much higher than the surrounding ground;

"Q. That is true when Sherman Park floods, isn't it. The refuse from the river [funs] up on the banks and is left there, and a very healthy crop of mosquitos is produced?

A. There is a very good reason for that. Sherman Park is filled with little ravines and is very much shaded. It is much better now than it was because many of the trees have been cut out.

Q. Directing your attention to the Park again, those conditions are true every time that it floods, that it causes an unsanitary condition there?

A. I presume it does to a certain extent."

We have abandoned Lien's Park on account of the water, which has practically cut out the park; it has been kept open,

and there are some picnics held there, but it is practically abandoned; it is a little north and east of the Penitentiary, and just a little west of the spillway.

361 In my judgment it would be unsafe to change the lengths of the railroad bridges and other bridges across the Sioux River in town. The Omaha bridge is some wider than the Eighth Street bridge, I think. They have filled some of the trestles of the Omaha. It is not so wide as it was before. As the Eighth Street bridge now stands, I think it has always served its purpose of letting all of the water of the river pass underneath it. I do not know the amount of water that comes down the Sioux Valley. I know that the elevation of the land north of the spillway is about two and one-half to three feet to the mile from Thompson's bridge down to where it enters the present spillway. The amount of water shed varies very much. It would be pretty hard to tell the amount thereof.

(Re-direct Examination.)

The channel of the Big Sioux River that passes through the city has been infringed on very much in the past twenty-five years; Since I came here in 1879—the river covered much more territory then than it does now and was very flat. When we got a heavy rain the stream flowed out and later would narrow down to a smaller stream again. During the years 1919 and 1920 the water in the river has been the highest that I can recall, and especially up around the city water plant and electric light plant, than at any time prior to that, since 1881; there has been no damage by high water to the city property since 1881; the Cascade Mill dam was built I think in, 1878; they were finishing it in the spring I came here.

F. E. SPELLERBERG, called and sworn as a witness testified as follows:

(Direct Examination.)

I am and have been since March 1916, superintendent of parks of the city of Sioux Falls; only a very small part of one end of Covell or Phillips park and about half of Sherman Park and about half of Lien Park are affected by
362 high water; Lien Park is situated a little east of the spillway; since the spillway was put in, the Board has taken out practically all the improvements at Lien Park that could be used at other parks and merely cut the grass and keep it available for use at such times as people can go in there when it is dry enough; we took out the improvements

because we could use them at other places and they were practically abandoned and of no use at Lien Park on account of flooded conditions from the river overflow from the spillway; the city has practically abandoned Lien Park as a park since the spillway was built; prior to the building of the spillway the city had started in to improve it; the spillway empties into the river above Lien Park and then flows down past it.

The high water does not affect Phillips Park to amount to anything; it overflows a small area at one end where the ditch overflows and comes down to Covell Lake; Phillips Park is practically all high ground bordering on Covell Lake with the exception of a small flat area at one end; it is rough land and cannot be used for agricultural purposes.

The lands of Sherman Park cannot be used for agricultural purposes; that park has overflowed every year except one since I have been here; it did not overflow in 1921; with the exception of that year it has overflowed every year for five years; in 1919 the overflowed condition started in the latter part of May and continued for two weeks into June and then dried up for a short time; the park was [useable] on the 20th of June and then overflowed once more in the middle of July; in 1920, we had practically no use of the lower part
363 practically all season, the lower part of the park is on the west side of the river; in the years 1919 and 1920 the river came up the highest it has been to my knowledge and the overflowed conditions continued longer those years than in any prior year.

(Cross-Examination).

“Q. The length of those periods would indicate to your mind that there was more water came down the Sioux Valley those years, would it not?

A. I am not sure I am competent to judge.

Q. You would naturally arrive at that conclusion?

A. I might.

Q. Anything that would tend to divert that water would be to the advantage—If a certain amount of water came down the Sioux Valley and you could keep part of it or divert it from Sherman Park, it would shorten the period that Sherman Park would be covered with water would it not?

A. I would sooner not answer that. I don't know that I am competent.

Q. Say yes or no.

The Court: I don't think he can''.

There are 52 or 53 acres in Sherman Park; only about 20 or 25 acres are on the lower level; if the land was not occupied for park purposes, it would not make a good pasture as there is not enough grass there; the land around there is used for pasture, but it is higher; the land north of the park is used somewhat for cultivated crops and they are taking their chances on it; the acre and a half or two acres at Phillips Park could be tilled or turned into pasture or produce hay after a fashion; they would have to wait until after the
364 flood had come down; it makes a late crop proposition.

O. S. THOMPSON, called and sworn as witness testified as follows:

(Direct Examination)

I reside in Sverdrup Township and was born there in 1875 and have resided there ever since; about 10 miles north of Sioux Falls; I own 503 acres in the Big Sioux River Valley where I live; within the drainage district there is close to 300 acres; I have farmed my land since 1897 and was residing there when ditch No. 2 and also ditch No. 1 was constructed; I think ditch No. 1 was constructed in 1909 and ditch No. 2 was constructed the following year; ditch No. 2 starts about 1 mile northwest of Baltic; it starts right in the river at a point about 15 miles north of the spillway near the penitentiary; from the point where ditch No. 2 starts to where it joins ditch No. 1 is about 11 1/2 miles; the length of ditch No. 1 is 3 1/2 miles; the width of ditch No. 1 at the top is about 90 feet; the top width of ditch No. 2 is 45 to 50 feet; it is possible that at the very north end it is down to forty feet; the average depth of ditch No. 2 is about 6 feet and of ditch No. 1 about 6 feet; the present spillway was finished in 1918; the old spillway was washed out in 1916; the present spillway is a little less than 12 feet in diameter; the intake of the spillway is the lower end of ditch No. 1 and is ripped, then there are two gates leading into a hole that goes down through the ground about 40 feet; the shaft is perpendicular for about 40 feet; at the lower end of it a channel is run out towards the river towards the east sloping downwards so that it comes out just above the river level on the lower end; there was nothing that prevented all of the water that was gathered by these ditches No. 1 and No. 2 at

the outlet or spillway to prevent all of the water going over the hill; since the new spillway was put in, I have lost more crops than I did before it was put in and after the
365 construction of ditches No. 1 and No. 2 my losses have been considerably more since the new spillway was put in than they were before it was put in and after the ditches were constructed.

Defendants were thereupon given permission by the Court to make the witness their witness for the purpose of identifying certain exhibits and he thereupon testified in behalf of defendants as follows:

Defendants' Exhibit 2 is a petition to the County Board asking for the establishment of what is known as Covell Lake cut-off. The first signature attached thereto is mine. I signed that, and I had that presented to the County Board for the purposes set forth in the petition. I own land in the vicinity of Drainage Ditch No. 1 & 2 that is affected by that ditch. I evidently furnished the bond designated as Defendant's Exhibit 3.

Defendants' Exhibits 2 and 3 were offered and received in evidence as part of defendants' case.

FRED H. REED, Called on Behalf of the Plaintiffs and Sworn Testified as follows:

(Direct Examination.)

(It is stipulated that Northern States Power Company is the successor in interest of the Sioux Falls Light & Power Company in and to the property involved in this action.)

366 My name is Fred H. Reed; I have lived in Sioux Falls since 1899; my occupation before coming to Sioux Falls was farming; since coming to Sioux Falls I have been looking after farms, real estate and other properties; I was the Secretary of the Sioux Falls Light & Power Co., and of the Sioux Falls Improvement and Development Co's interest in certain properties in the vicinity of the Queen Bee Mill at one time; I had charge for Mr. E. W. Coughran and various of his associates of properties in the vicinity of the present hydro-electric plant of the Northern States Power Co. for a long period of years and since about 1900; my office is in the Lacotah Building between 8th and 9th streets and between Phillips Avenue and the Big Sioux River on the east side of Phillips Avenue and the west bank of the

river in Sioux Falls; it is in the rear of the building facing the river; at the time I came to Sioux Falls there were three dams across the river in the vicinity of the present power plant; the Cascade or upper dam, the Queen Bee dam, and what was known as the Bennett dam; the Cascade dam is the dam below 8th Street and is still in existence; the Sioux Falls Light and Power Co. was organized in 1907 and constructed the present hydro-electric plant of the Northern States Power Co., completing it in 1908; prior to the construction of that plant the Sioux Falls Light & Power Co., acquired in the spring of 1907 and operated the Cascade mill property; I first became associated with the property which is now the property of the Northern States Power Co. and the Queen Bee Mill property and the other ground in this immediate vicinity in 1900; I am familiar with the nature and character of the present real property interests of the

367 Northern States Power Co. including tracts 6 and 7 of the County Auditors subdivision of the Northeast of Section 16, township 101, Range 49, Lots B and C of Sioux Falls Light & Power Co's subdivision, tract 2 of the County Auditor's subdivision of the Northwest Quarter of said section 16, and also the property upon which the hydro-electric plant is now located; I don't know that there is any soil on that real property; it is rock, granite, come to the surface; that is true with reference to all of that tract of land in there; in my opinion it would not be possible for any part of that land to be used for agricultural purposes; the hydro-electric plant of the Sioux Falls Light & Power Co. now the Northern States Power Co., was operated partially under my supervision as one of its officers; I was familiar with its construction at that time; at the time of its construction the question of constructing it in such manner as to withstand all flood conditions of the Big Sioux River and prevent any damage to the property or its water power from flood conditions was [discusses] and taken into consideration; the hydro-electric plant was so designed under the instruction of our company as to guard against such flood conditions and was so constructed; at that time our engineers had data with reference to the flood waters of the Big Sioux River; no part of that property down there now owned by the Northern States Power Co. has been flooded since 1900; I have observed it every year since then; the largest flood that I recall; I think was prior to the year of 1907, the time the ditch was first constructed; at the time no part of this property was

368 flooded; the hydro-electric plant of the Northern States Power Co., is east and some south of the spillway of

ditch No. 1 and 2 and north of the Cascade dam and the city of Dell Rapids is north of the spillway; I think the hydro-electric plant is about 1/2 mile from the mouth of the spillway; the foundation or lower part of the hydro-electric plant is made right in the solid rock; the rock was blasted out for a distance of something over 30 feet deep; that part would be solid ground and the part from the granite on up with cement, concrete; for the first story it is in granite; the dam was so constructed as to take care of the flood waters; I have observed from my office window the condition of the river at various times during all these years; I have not observed any appreciable difference in the volume of water flowing down the Big Sioux River since the construction of the spillway; the Lacotah building property is never flooded and the water never got into the basement.

(Cross Examination)

At the time I was connected with the company I was familiar with all the Northern States Power Co. equipment and machinery and with the three dams; the dam which the Northern States Power Co. now has is the same dam the original company put in; that was Queen Bee property at one time; the Bennett dam was below the Queen Bee property; it is not there now; it was about 16 feet in height and I think has all been blasted out; when the dam was taken out I think the tail race of the Northern States Power Co. was lowered; I suppose on a level with the river below the dam, probably 16 feet; that would help the water get away
369 from the wheels of the plant and produce more power;

I think the Sioux Falls Light & Power Co. had a seven foot flume; I don't know whether the Northern States Power Co. has changed the flume or not; the property north from the dam to the present hydro-electric plant of the Northern States Power Co. is mostly granite.

O. A. ROFELTY Called on Behalf of the Plaintiff and Sworn testified as follows:

(Direct Examination)

My name is O. A. Rofelty; I live in Sioux Falls, South Dakota; I am Manager of the Northern States Power Co. and have general charge of its business and the operation of its property including this district; I have been in that position since November 27, 1918; the plant consists of Hydro and steam plants for the generation of electric power; that is

essential; it is quite necessary for us to have the steam plant to supply the demands for electricity in the city of Sioux Falls; the water plant has not sufficient capacity; in the past, during the year 1921, there has never been a day but when we kept the steam plant going all the time, not even an hour, day or night; it was necessary to do that in order to serve our customers; we operate the two plants together as one unit for generating and selling electricity when we have any water; it does not make a particle of difference in the operating expense of this plant such as labor and help whether the steam plant is required to produce a larger or smaller part of the load; I am familiar with all the ground or land owned by the Northern States Power Co. down there; I would describe it as a large pile of stone; it is not level; it is
370 piles of stone here and there, a topsy turvy condition; the stone is what they call a red granite; there is not any soil on any of the Power Company's property there sufficient to be used for cultivation of crops of any kind.

(Cross Examination)

The capacity of our steam plant is about 5000 kilowatts; the rated capacity of our water plant, I believe, is 1400 to 1500 kilowatts; if the water is low or for any other reason we can't put the water over our turbines and have to produce this current with steam, it costs more money; what current we make by steam costs more than what we would make by water; there are times in the year when the water is not sufficient to produce any current; I have been manager down there since November 27, 1918; the company has not lowered the tail race since I have been there; we only cleaned it out; we never intend to lower it; I understand that our company succeeded to all the rights of the Sioux Falls Light & Power Co; Defendants' Exhibit "6" looks to me like a fair representation of the river and the location of our plant upon the river; I am unable to say positively whether the drop of our water from the top of our flash boards at our dam down the tail race was substantially as represented by this map or about 55 to 60 feet, but I think so; I think the size of our flume is about 7 feet; Exhibit "7" looks like a fairly good picture of our hydro-electric plant where the water enters the same by our flume, going through the turbines and discharging it into the tail race; I do not know of the lowering of the bottom of the driving tube or the tube carrying the water from the turbines into the tail race; the only thing we did was to clean out the loose dirt and stone that had fallen into it; we concreted that block of stone on the east

371 side of the river in 1920; we did that for the purpose of keeping the flood waters from carrying down the loose rocks that had gathered up there; the gorge you have mentioned north of our power house was full of water in 1919 and 1920; at the time of high water our tail race was up more than when the water is low; that is natural; the water outside was not as high as our lower power room; the water to the north of our building was not higher than the openings into our tail race; the water at that time did not get high enough to cover the solid granite wall on top of which our company has thrown its loose stone; it was still out of the water; I do not know how deep the water was in the tail race, that is pretty hard to say because it is just a matter of guess; I imagine we have about 25 feet of cement in there; that runs down to almost the level of the falls between those two walls; I do not think the tail race extends over fourteen feet below the concrete; in 1919 the water went about 3 or 4 feet on the rocks which are now covered by cement, during that time our hydro-electric plant could and did run at full blast.

"Q. Do you know the height of the gorge of your tail race?

A. No, I could not answer that.

Q. About forty feet?

A. That is a pretty good guess I should say.

(Redirect Examination)

I should say the difference in cost per kilowatt an hour between generating electric current by steam and water power is possibly 2 mills per kilowatt.

J. WILLIAM LINK, called as a witness on behalf of plaintiff and sworn testified as follows:

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(Direct Examination)

My name is J. William Link; I reside in Chicago; I am a hydro-electric engineer employed at the present time by the Byllesby Engineering & Managing Corporation; next February I will have been in its employ 12 years; my first experience in hydro-electric work was with the Missouri River Commission; I was with them for five years on the Missouri River Work; subsequent to that I was for five years on the Metropolitan Water Works in Boston; following that I was with the Niagara Falls Power Company for 4 years; I think it was; and then with the former resident engineer of that

company, who opened an office for himself and I took charge of his office for him for a year or 18 months; I then was
373 with the City of Columbus, Ohio, for two years; following that I was with the Long Soo Development Company of the St. Lawrence River for two years, and with the Passaic Valley Sewage Disposal Commission for three months; I then came with Byllsby & Co., and I have been with them ever since; I should say the experience I have outlined covers pretty well the field of hydro-electric engineering; I have had a good deal of experience in the designing and construction or superintendence of construction of hydro-electric plants and water plants, particularly plants for the generation of electric current; I have had experience in the installation and inspection of water wheels and water machinery; I have not had experience in the designing of water wheels; that is a specialty; I have installed that kind of work and written specifications for them and designed what kind of wheels should be installed, etc; since I have been with Byllsby interests I have had complete charge of their hydro-electric plants in the different parts of the country; these plants are scattered pretty well over the country; we have 5 plants in Minnesota in the vicinity of the twin cities and southwest of there; we have two plants in Wisconsin; we have two plants in California; a plant in Oregon and a plant in Montana, and the plant here in Sioux Falls; I think that covers the water power plants pretty well; I have examined the drainage ditch and its course; I have made a study of the hydro-electric plant in this city operated by the Northern States Power Co.; that was constructed before my connection with the Byllsby interests; the Byllsby interests constructed that plant before they acquired it, for other parties, the plant referred to being the hydro-electric plant in question here; I would call the construction of the plant very massive; I have investigated the stability of the dam, its capacity to withstand flood waters, and after examining the whole
374 plant, I should say that it is particularly well designed and constructed to withstand floods or anything of that nature; the massive walls I speak of are of concrete material; I have made a study of the flood conditions in the valley of the Big Sioux River; my sources of information have been government reports and the information I have gleaned from newspaper accounts and talks with various parties who have been on the ground and know the floods; the nearest I can judge, according to the information I have obtained, the greatest flood that there is any record of in that valley was the flood of 1881; I think the design and

construction of the plant down here would be sufficient to withstand the flood stages of 1881; I think it would do that if there were no spillway or drainage ditch because the plant was constructed before the spillway was, and so far as I can find out no account was taken of the spillway at all; independently of that, the nearest estimate that I could make of the probable volume of the flood of 1881, the dam would discharge that without even raising the water any higher than we carry it ordinarily; in my judgment, the company operating this plant would absolutely not be justified in the expenditure of any money for the construction of the drainage ditch, and spillway that has been talked about here on the basis of benefits to the plant in any way; it is my opinion that there is no appreciable benefit to the plant of the construction of the improvement out there.

(Cross Examination)

“Q. Mr. Link, you made for the County Commissioners of this county a hydro survey at one time, of this territory, did you not?

A. I don't think I made a survey.

Q. You made a report to the Board? A. Yes.

Q. And the data you testified about? Your attorney asked you on what data you based your opinion and you said upon government reports.

A. And some survey data taken by the Board's engineer.

Q. And you made a report as to the feasibility of this drainage project did you not?

A. The feasibility? In what way do you mean? I don't quite get your idea.

Q. That it was feasible from an engineering as well as a financial standpoint?

375 A. It was feasible to build it, yes.”

In that report I stated that the maximum flood liable to occur in the reaches of the Big Sioux River under consideration which has this ditch construction, will probably not exceed ten thousand second feet. This condition was probably approximately as it existed in 1881; and that the floods which occurred in the spring of the year 1916—the amount of water that came down the river and the ditch at that time did not exceed six thousand or six thousand five hundred second feet. It seems to me the amount of water that went through the old spillway in 1916 was 1400 cubic feet per second; I am not sure; I recommended to the Board that the spillway be constructed to take care of approximately 2500 cubic feet per second; in my judgment the amount of water

that was carried down the Sioux Valley during the freshet of 1916 was approximately 6000 feet per second; that was the spring that the spillway washed out; I do not know that you call the 1916 flood an ordinary flood; I have not been able to find any record of flood stages in the river and I am not sufficiently familiar with the floods from year to year to know whether that flood would be considered an ordinary flood or not; I would rather say that it was larger than the ordinary flood; that is if by the ordinary flood you mean the intensity of flood that occurs most frequently; the amount of water that came down the Sioux Valley in the year 1881 is probably the maximum; I do not remember whether in that report I recommended to the Board that the opening which had occurred at what we have been calling Schotz, about 3 miles north of town, a dam be placed in there to keep the river in its old channel and to keep it from coming down through the ditch; I would recommend it; at the time I made this report I was employed by the Bylls-Co., Byllsby & Co. manage the Northern States Power Co., but it isn't the same company by any means, we do the managing for the Northern States Power Co.; I am familiar with the plant of the Northern States Power Co. and the improvements made since 1910; I was familiar with the construction of the old plant through the drawings and inspecting of the plant, etc.; defendant's Exhibit "7" was prepared before my time; in a general way I should say it substantially represents the plant here; it looks to me more like a picture plan than it does like a working plan; it was signed by the chief engineer, so I presume probably it was one of the construction plans; I do not remember the distance between the bottom of our turbine and the outlet in our draft tube; but I would say in the vicinity of 18 or 20 feet; the Northern States Power Co. had to lower their tail race to take advantage of the head at the Bennett dam; we destroyed the Bennett dam and lowered our tail race to take in that head; that lowering gave us more head; the lowering of the tail race does not give us more power; the head we had before was sufficient to run the generators full capacity with the wheels flooded; the lowering of the tail race enables us to pull a larger load with less water; we got no more power out of the units than we got before; they have a certain fixed output; the increasing of that head only conserved water; it didn't increase the output of the plant at all; the higher the head the less water you use, but if you have a machine in there with a fixed output, it doesn't make any difference how much head you put on it, you can't get any more power out of it; it will burn up if you do; what I mean is that the lowering of our tail

race, we could only turn out 6000 kilowatts from each unit, but we could get that 6000 from a smaller supply of water and consequently when the river is low we are able to get current longer than we could before; the capacity of the plant is fixed by the units in there; they could be run approximately 6000 kilowatts each; there are three units; the result of piled up water on our tail race is to lower the head but with those units not to produce less power; the head is the total fall; I don't think I have any positive information as to the length of time that the floods last here, but the general impression I have gotten from the data is that the maximum conditions only last for two or three days; the flood itself, the river in flood stage I imagine for a considerable longer period of time; I think I am familiar in a general way with the general topography near our plant; Exhibit "5" fairly represents the condition from the northwest corner of the plant toward the old falls for a short distance; Exhibit "4" I am unable to identify; defendants' Exhibits "8" and "9" fairly represent the condition at our tail race; if a dam were put in at Schotz up here which was outside of the drainage ditch project, which kept the river in its banks, permitting the water to flow around the city to our water plant instead of going through and coming into the spillway, it would benefit the Northern States Power Co. to the extent that it would not deprive them of what they had a right to; I would not call it a benefit because we

378 have a right to that water; the benefit would be to give us the water that we have a right to here and which was taken away by the ditch; if there were controlling works placed in this ditch at Thompson's bridge some 12 miles up the river which maintained the level of the water in the river and will not permit the river water to go into the ditch until it reaches a certain height, which is flood condition, that would benefit the Northern States Power Co. in just the same way.

(Redirect Examination)

Q. From your examination of that region up there at the time you made the report as representative of H. M. Byllsby, I wish you would tell the court what that ditch and improvement is with regard to lands down here in the city and particularly in regard to the region down about the Northern States Power Co. property; what is the proper term for it?

A. It acts as a flood water bypass; there is no drainage; by flood water bypass I mean that it takes flood waters out of the river and passes them around and back in again; it relieves flood water conditions a certain small extent in certain stages of the river; I would say that that ditch is not

a drainage at all in this section down here; in my judgment the power plant of the Northern States Power Co. as now constructed would be sufficient to withstand a flood equal to the flood of 1881; as I stated before I would think it would pass such a flood without raising the water higher in the dam than we ordinarily carry by means of flash boards; those flash boards should be removed at times of floods; the Bennett

dam was destroyed under my supervision; it was destroyed to get advantage of more head water or unite that head with ours in one plant.

Q. Something was said here by another witness about the cleaning out of that tail race or some part of the same. I wish you would tell just what was done in that regard and why.

A. The construction superintendent, without asking permission or without my knowledge, built the spoil right on top of the excavation, which was contrary to my intentions, and built it with practically a vertical face, and without very much arrangements of the stones; consequently the first flood that came down washed out some of the stone at the bottom of the piles and started the disintegration of the spoil, and subsequent floods I presume did more, and the elements helped it along, frost action, and a great deal of this spoil had fallen back into the tail race until it raised the level about 4 feet; this work that was done in 1920 was simply to clean that out, and in order to put it so it would not fall back again we moved it back on the west side about 10 feet from the edge of the ledge; on the east side we put a concrete facing on it because there we had used the top of the spoil bank which had been leveled off for an outdoor sub-station, and this was so close to the edge of the spoil bank that we had to make it sloping to hold the substation and some transmission line poles there, and we felt that without a concrete face it might slip in again so we put a concrete face on that side in order to prevent it; that was the reason for that work; the proposition was to restore the tail race.

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(Recross Examination)

This bypassing of the water I have mentioned would tend to relieve the Sioux River from the point where it took the water from the river to where it deposited it back in the river; it would relieve the river of the amount it carried.

Q. Doesn't that ditch up through there also drain agricultural lands?

A. As I saw it when I inspected it, I should say to very small extent as I understand drainage; there were only 3 or

4 inlets I could see where the farmers could take advantage of the drainage.

(Redirect Examination)

If I were designing a hydro-electric plant on the present site of the plant here today, knowing that the ditch and spillway had been constructed and are there as they are, as I know the ditch and its history, I would not take the ditch and spillway into consideration at all in the designing that plant, particularly with a view to resistance to floods or possible floods.

A. G. RISTY, recalled and examined by the Court, testified as follows:

The northern end of this ditch No. 1 and 2 was one mile north of Baltic; the end of the ditch opens into the Sioux River; there are no artificial laterals; if there are heavy rains on the lands adjoining this ditch which runs north and south in a general direction that flood the lands on either side of it, it is the intent and purpose that the ditch shall take care of such flood waters.

381 Q. How will it get into the ditch?

A. It slightly slopes into the ditch?

Q. How could it get over the embankment without laterals?

A. There are pipes at certain places to let the water in through the embankment into the ditch, and that you can adjust running out into the farm lands; there are pipes here and there along the ditch to let waters in when the bottom lands overflow, and it has also been proven that these ditches drain the bottom lands, because there are farms all along and it has lowered the water in their wells to a very considerable extent since the ditch was dug, so it shows it drains the lands; they propose to have gates in the embankment so that when the pressure was from the inside it would close the gates and if the pressure came from the outside it would open them within this service pipe.

Q. Then the real purpose of this ditch as I understand it is to take the water from the Sioux River in flood times and conduct it down to the spillway and into the river at the mouth of the spillway.

A. And preventing the overflow to a great degree from spreading over the farm lands.

Q. And the purposes of the ditch, the effects that the ditch is to perform, the thing that you intended when you were constructing was that it should be an

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[auxiliary] to the river and relieve it of the surplus flood waters?

A. If the Court please, I was not on the Board when the ditch was constructed; only when we repaired the spillway, it has been my understanding always that it was to help carry off the flood waters.

Q. It is rather to take the water from the river at its maximum capacity and thus relieve the river of that water rather than to drain the lands along the sides; in other words, it is to keep them from being overflowed with this water?

A. That has always been my understanding.

Plaintiff rests.

Motion to Dismiss

The Counsel:

At this time, Your Honor, at the close of the plaintiff's cases in chief, the defendant renews the motion to dismiss the bills of complaint in these actions and set aside the restraining order heretofore issued, for all the reasons and upon all the grounds urged in the motion made at the opening of these cases.

And for the further reason that the record now shows that notice of an opportunity to be heard upon the amount or proportion of benefits these plaintiffs have received and the amount or proportion of assessment that will be made against their property for such benefits, has been given to them and the plaintiffs in these cases have a plain, adequate and speedy remedy at law.

For the further reason that the record now shows that the method of apportionment of benefits and assessment to be made thereon as provided by the laws of South Dakota and applied by the Board of County Commissioners in these cases, based upon their judgment of values and benefits conferred to the property of these plaintiffs in these cases and others, is a standard method of apportionment which will probably produce substantial justice generally, and the probability is that the parties will be taxed proportionately to each other and all others upon whom benefits are conferred, by the method provided and employed as shown by the evidence in these cases, and will probably produce approximately correct general results.

For the further reason the record now shows the Board of County Commissioners of Minnehaha County, charged by the

law of this State with the execution of the provisions of the drainage ditch law, has jurisdiction to proceed in respect to the property within said drainage area including the property of the plaintiffs in these actions, and if there have been any errors in the administration of the statute, the same do not involve the jurisdiction of that tribunal over the property of these plaintiffs or otherwise, and the record does not indicate upon its face any gross departure from the requirements of the statute, therefore this Court cannot inquire into these collateral proceedings, and the same are not questions presenting a federal question.

The Court: The motion is denied pro forma.

The defendants, to maintain the issues on their part, called as a witness F. L. BLACKMAN, who being duly sworn testified in substance as follows: My name is F. L. Blackman. I resided in the city of Sioux Falls on July 15, 1916, and at that time had property within the drainage area of Drainage Ditch No. 1 & 2. Defendants' Exhibit 10 being a petition dated July 15, 1916, addressed to the Board of County Commissioners of Minnehaha County, South Dakota, signed by the City and others, the name of F. L. Blackman appearing thereon, was signed by me.

384 GEORGE W. BURNSIDE, in behalf of defendants, being duly sworn, testified:

As mayor of the City of Sioux Falls, I signed defendants' Exhibit 10, being a petition addressed to the board of County Commissioners of Minnehaha County, dated July 15th, 1916; at a special meeting of the city commission, they decided to ask the County Commissioners to protect the destruction of the drainage ditch in order to protect our water plants.

F. E. WARD, being called as a witness on behalf of the defendants, testified in substance as follows:

Defendants' Exhibits 10 to 32, inclusive, are records and files in my office as County Auditor of Minnehaha County, with reference to the establishment of Drainage Ditch No. 1 and 2. Defendants' Exhibit 10 is the petition of the City of Sioux Falls, F. L. Blackman, et al, for the establishment and construction of Drainage Ditch No. 1 and 2. Defendants' Exhibit 11 is the bond accompanying and filed with the pe-

tition. The material portion of said Bond, being defendant's exhibit 11 is as follows:

385 "Bond on Petition for Drainage.

Whereas, the parties whose names are signed hereto have prepared and executed and intend to present to the Board of County Commissioners of Minnehaha County, South Dakota, a petition to reconstruct and improve drainage ditches Number 1 and 2, in Minnehaha County, South Dakota, and to construct a new spillway or outlet to the said drainage ditches numbered 1 and 2, and to pay therefor by an assessment upon the property, persons and corporations benefited thereby, a copy of which petition is hereto attached marked Exhibit "A" and made a part hereof.

386 Now, Therefore, we F. L. Blackman, E. D. Clark, W. Brady, Dan Donahoe, Den Donahoe, W. M. Donahoe, Catherine Peck, Porter P. Peck, Mary Brace, John P. Bleeg, Frances G. Carpenter, McKinney & Allen, as principals, and Inter State Surety Company as surety, do hereby undertake, promise and agree to and with the County of Minnehaha, of the State of South Dakota, that we will pay all expenses incurred in case the Board of County Commissioners of said County do not grant said petition, or in case the said petition is denied on appeal.

F. L. Blackman, E. D. Clark, W. Braley, Den Donahoe, Dan Donahoe, W. M. Donahoe, Catherine Peck, Porter P. Peck, Mary C. Brace, John P. Bleeg, Frances G. Carpenter, McKinney & Allen, Inter State Surety Company, by A. B. Fairbanks, Its Attorney in Fact.

This bond approved August 1, 1916, Harry H. Howe, County Auditor.

Defendants' Exhibit 12 is the order of the Board of County Commissioners for filing said petition and bond. Defendants' Exhibit 13 is a letter of transmittal of said petition with reference to Drainage Ditch No. 1 and 2, to the State Engineer at Pierre, the material portions of which are as follows:

"August 4, 1916.

Homer M. Derr, State Engineer,
Pierre, South Dakota.

Dear Sir:

I enclose herewith new drainage petition with reference to Drainage Ditches Numbers 1 and 2 and the spillway thereof,

which have been ordered filed and transmitted to you. It is the especial wish of the County Commissioners that you view this drainage proposition with them at your earliest
387 convenience, as it is necessary that this improvement be made soon, so as to avoid further damage. The parties have agreed to abandon the Covell's Lake extension terminus, in case the drainage proposition is established in accordance with this petition, or a modification thereof.*****

Please give this matter your immediate attention, and advise as to when you can view this drainage proposition with the Commissioners.

Yours truly,

Enc.

EOJ:M

County Auditor."

Defendants' Exhibit No. 14 are the minutes of the Board of County Commissioners of August 3, 1916, of adjournment from that date to August 14, 1916. Defendants' Exhibit 15 are the proceedings of the Board of County Commissioners, under date of August 14, 1916. Defendants' Exhibit 16 is the resolution of Board of County Commissioners for a survey of the territory to be drained by Drainage Ditch No. 1 and 2. Defendants' Exhibit 17 is the Surveyor's Report, the material portions of which are as follows:

"Report of Preliminary Survey of Said Proposed Drainage Ditch for the Territory now Partially Covered by Drainage Ditches Numbers 1 and 2, Sioux Falls, South Dakota.

To the Honorable Board of County Commissioners, Minnehaha County, South Dakota:

In accordance with the resolution of your Honorable Board dated August 14th, 1916, authorizing and directing a survey of the proposed drainage of the territory covered by drainage ditches numbers 1 and 2, as now established, and directing that the exact line or lines of said proposed drainage be established under the supervision of the State Engineer, I
388 took up the work, and, as per your request, file herewith a limited report of the survey of such territory showing the exact line of the proposed drainage ditch as follows, to-wit:

Section One

Commencing at a point 58 feet West and 1035 feet North of the Southeast Corner of Section 29, Township 102, Range 49, West of the 5th P. M., running thence South * * * * *, the said line being the center line of said drainage ditch, and is intended to cover the exact location of drainage ditch number one as now established and constructed.

Section Two.

Commencing at a point 1035 feet North and 58 feet West of the Southeast Corner of Section 29, Township 102, Range 49, the same being the commencement point of Section 1, hereinbefore described, running thence North * * * * *.

Section Three.

Commencing at a point 1640 feet East of the center of Section 18, Township 103, Range 49, running thence North * * * * *, the said line being the center line of said proposed drainage.

That in addition thereto, the Big Sioux River is to be straightened in Sections 17, 18 and 20, Township 103, North of Range 40, in order to afford better means of communication between the lower end of Section 3 of said ditch, and the upper end of Section 2 thereof, the same being intended to cover the exact location of drainage ditch number 2, as now established and constructed.

I further recommend that the Big Sioux River be straightened * * * * *.

All of the above cut offs to have a bottom width of 60 feet, and side slopes of one and one-half to one. A right-of-way 100 feet in width and one-half each side of the above described center lines will be required. The plans and specifications for the proposed spillway on Section 9, of 389 Township 101, Range 49, will be furnished later.

Dated this 13 day of September, A. D. 1916.

Respectfully submitted, L. E. Stevens, Deputy State Surveyor. Filed in the office of the Auditor of Minnehaha County, S. D. this 13 day of September, 1916, Harry H. Howe, County Auditor, by E. H. Shenkle, Deputy.

Defendants' Exhibits 18 and 19 are the proceedings of the Board and the resolution of the Board fixing the exact line

and width of Drainage Ditch No. 1 and 2, of September 13, 1916. Defendants' Exhibit 20 is the drainage ditch notice for Drainage Ditch No. 1 and 2. Defendants' Exhibit 21 is the affidavit of publication of drainage ditch notice, the material portion of which is as follows:

390

"Affidavit of Publication

C. L. Dotson, being first duly sworn, deposes and says: That he is a resident of the County of Minnehaha and State of South Dakota; that the Sioux Falls Press is a Daily Newspaper of general circulation, printed and published in the City of Sioux Falls, in said County and State, by C. L. Dotson, and is now and has been such newspaper continuously during all the times hereinafter mentioned; that the affiant is and was during all the time hereinafter mentioned, the publisher of said newspaper and in charge of the advertising department thereof, and has personal knowledge of all facts stated in this affidavit, and that the notice and advertisement headed Drainage Ditch, a printed copy of which is hereunto attached, and made a part hereof, was printed and published in the said newspaper for issues.

That the first publication of said notice in said newspaper aforesaid was on Saturday, the 16th day of September, A.

391 D. 1916, and that the succeeding publications were severally on Saturday, the 23rd day of September A.

D., on Saturday, the 30th day of September, A. D. 1916; that the fees charged for the printing and publication of said notice and advertisement in said newspaper, as aforesaid, were dollars and cents, and for this affidavit, Twenty-five cents, and that the said fees for the printing and publishing of said notice and advertisement and for this affidavit, as aforesaid, have been fully paid; that the full amount of the fee charged for the publishing of the said attached and annexed notice and advertisement inures to the benefit of the publishers of the Sioux Falls Press; that no agreement or understanding for the division thereof has been made with any other person, and that no part thereof has been agreed to be paid to any person whomsoever. That the said newspaper is a legal newspaper, as provided in Session Laws of 1903, and amendments thereto * * * * * Filed in the office of the Auditor of Minnehaha County, S. D., this 30th day of Sept. 1916 Harry H. Howe County Auditor.

Defendants' Exhibit 22 is a Certificate of Posting said Drainage Ditch Notice. The material portion of which certificate of posting Drainage Ditch Notice, is as follows:

'I, Jerry Carleton, Sheriff of Minnehaha County, South Dakota, do hereby certify that on the 21 day of September, A. D. 1916, I posted three copies of the annexed Notice in three public places near the route of the proposed drainage mentioned therein, as follows, to-wit: One on the bridge on North Minnesota Avenue crossing Drainage Ditch Number One, in the City of Sioux Falls; one on the bridge in Berwick's Addition to the City of Sioux Falls, crossing Drainage Ditch Number One near Fifth Avenue; and one on the bridge crossing Drainage Ditch Number One on Section 29 of Mapleton Township; that I also posted one of said copies at the South Front Door of the Court House in the City of Sioux Falls, all in Minnehaha County * * * * *

392 Filed in the office of the Auditor of Minnehaha County, S. D. this 23 day of Sept., 1916, Harry H. Howe, County Auditor.

Defendants' Exhibit 23 are the minutes of the Board of County Commissioners in relation to Drainage Ditch No. 1 and 2, of October 2 and 3, 1916, the material portions of which are as follows:

"October 2, 1916.

At the meeting in the County Court room, the Commissioners listened to arguments presented by those in favor of the drainage ditch, and the straightening of the Big Sioux River, and also to arguments against the straightening of said Big Sioux River, there being no objection to the establishment and construction of the main ditch project. The State Engineer, Homer Derr, recommended that the main drainage ditch, as petitioned for, be established and constructed with proper controlling gates and a sufficient spillway.

Claims for damages were filed as follows:

Kittery Realty Company	\$2000.00
Margaret Finnegan	1000.00
James L. Finnegan	8000.00

The whole afternoon was taken up in the discussion of the drainage project, and the suggested straightening of the Big Sioux River. At the hour of five o'clock P. M. an adjourn-

ment was taken until ten o'clock A. M. on Tuesday, October 3, 1916."

"October 3, 1916.

Pursuant to adjournment, the Board convened at ten o'clock A. M., and in company with the State Engineer, Homer Derr, visited the site of the proposed spillway and control gate, at the head thereof. The Board then returned to the Commissioners' Room, and held a conference with the State Engineer with reference to said proposed drainage. Mr. C. T. Charnock then moved the adoption of the resolution establishing said drainage, and that the vote be taken by districts. Mr. J. E. Johnson seconded the motion. Upon roll call

A. G. Risty, District No. 1 voted yes.

J. E. Johnson, District No. 2 voted yes.

J. L. Fritz, District No. 3, voted yes.

C. T. Charnock, District No. 4, voted yes.

J. A. Jensen, District No. 5, voted yes.

The Chairman then declared the resolution adopted. The State Engineer was then requested to prepare and submit plans and specifications for the necessary spillway and control, or headgates, at his earliest convenience. * * * *

Mr. C. T. Charnock moved that the hearing on damages occasioned by the establishment of Drainage Ditch No. 1 and 2, be adjourned until Friday, October 6, 1916, at ten o'clock A. M., and be made a special order for that date. Motion seconded by J. A. Jensen, and carried unanimously."

Defendants' Exhibit 24 is the resolution of the Board of County Commissioners establishing Drainage Ditch No. 1 and 2 upon the petition of the City of Sioux Falls, F. L. Blackman, et al. Defendants' Exhibit 26 are the minutes of the Board of County Commissioners for October 6, 1916. Defendants' Exhibit 27 is a resolution of the Board of County Commissioners of October 6, 1916, assessing damages as compensation for lands taken in the construction of Drainage Ditch No. 1 and 2, the material portions of which are as follows:

"Drainage Ditch No. 1 and 2.

Resolution Assessing Damages.

Whereas, the matter of assessment of damages caused by the establishment and construction of Drainage Ditches No.

1 and 2, was, on Tuesday, October 3, 1916, at a regularly adjourned meeting of the Board, deferred to and made a special order for Friday, October 6, 1916, at ten o'clock A. M., and the Board having met on said last named date, 394 and having heard and considered the claims for damages, and having taken into consideration the fact that the principal portion of said drainage ditch has already been constructed, and assessments for damages therefor having already been made and paid in the original construction of said Drainage Ditches No. 1 and 2, and that the principal part of the work to be done consists of building a proper spillway, flood or control gates, cleaning, deepening and widening the channel of the said drainage ditches as now constructed, building levees and dikes where deemed advisable, and other improvements to said drainage system;

Now, Therefore, Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the damages arising from the establishment of Drainage Ditch No. 1 and 2, including compensation for the lands to be taken for said drainage, be and they are assessed and awarded as follows, the same being in accordance with plats thereof, filed in connection with the original construction of Drainage Ditches No. 1 and 2:

395 To the Kittery Realty Company, for damages to Tract One (1), etc. * * * *

Be It Further Resolved, that it is the judgment and determination of this Board that in consideration of the fact that damages were assessed and paid in the original construction of Drainage Ditch No. 1 and Drainage Ditch No. 2, for all damages sustained by each tract of land, or other property, through which the said drainage ditches and the present drainage ditch pass, as damages and compensation for the land taken by the route of such drainage, that no damages will accrue, or should be paid, by reason of the establishment and construction of said Drainage Ditch No. 1 and 2, except as hereinbefore provided, and that the claims of Margaret Finnegan and James L. Finnegan for damages by reason of the recommended straightening of the Big 396 Sioux River, which straightening has not been considered and determined, be and the same are hereby disallowed, without passing upon the merits of said claims, in case it is determined to straighten said Big Sioux River, and said claims are refiled, and that no other damages will accrue to any person or property by reason of the establishment and construction of said Drainage Ditch, except as herein awarded.

fund.

same in the Sioux Falls, South Dakota, to the credit of such person, and to give such person notice of such deposit.

Kota. — "The city of the Sultan."

By A. G. Risty, Chairman."

Attest:

County Auditor.

Defendants' Exhibit 28 are minutes of the Board of County Commissioners of December 16, 1916, relative to Drainage Ditch No. 1 and 2, passing a resolution fixing the exact

line and width of drainage ditches straightening the Big Sioux River, as a part of Drainage Ditch No. 1 and 2, and fixing the time and place for hearing thereon, and defendants' Exhibit 29 in said resolution, the material portions of which are as follows:

“Resolution.

Whereas, on September 3, 1916, this Board, by resolution duly adopted, established Drainage Ditch No. 1 and 2, but expressly reserved for further ‘consideration and determination the question of the straightening of the Big Sioux River at the several points recommended in said Engineer’s report, without passing upon the merits thereof, for some later date when the straightening of the Big Sioux River will be given more complete consideration covering the points recommended and other points requested at the hearing’: and

Whereas, the Engineer, L. E. Stevens, has filed his supplemental report with reference to the straightening of the Big Sioux River, recommending narrower ditches than previously recommended, and also recommending the extension of the straightening of the Big Sioux River, and thereby varying the route of said drainage, together with maps and profiles; and

Whereas, the Board has personally inspected the route of said proposed drainage, as described in said petition for Drainage Ditch No. 1 and 2, and as described in said Engineer’s reports;

Therefore, Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the route and width of the ditch straightening the Big Sioux River, as a part of Drainage Ditch No. 1 and 2, be and the same is hereby fixed as described in said Engineer’s original report, as amended by his supplemental report, and that the requisite right-of-way of said drainage ditch and dump space, be and the same is hereby fixed as described in said Engineer’s report; and

Be It Further Resolved that it is deemed practicable and necessary to vary the route of said drainage occasioned by the proposed straightening of the said Big Sioux River, so that it will pass through other lands than those described in the original notice of hearing; and

Be It Further Resolved that the further consideration and hearing of said matter be adjourned to Saturday, the 30 day of December, A. D. 1916, at ten o’clock A. M., at the office of

the County Auditor of said County, in the City of Sioux Falls, South Dakota, and the same is hereby fixed as the time and place for the hearing of the said petition with reference to the straightening of the said Big Sioux River, as recommended in the said Engineer's original and supplemental reports, and that notice thereof be given in accordance with the provisions of Section 4, 5, and 28, of Chapter 138 of the Laws of 1907, as amended by Chapter 102 of the Laws of 1909 of the State of South Dakota. * * * *

399 Defendants' Exhibit 30 is a notice of hearing on the Sioux River cut-offs on Drainage Ditch No. 1 and 2, the material portions of which are as follows:

"Drainage Ditch Notice.

Sioux River Cut-offs on Drainage Ditch 1 and 2.

Notice is hereby given that Saturday, December 30, A. D. 1916, at ten o'clock A. M., at the office of the County Auditor of Minnehaha County, South Dakota, has been fixed by the Board of County Commissioners of Minnehaha County, as the time and place for the hearing of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others, filed August 3, 1916, for the establishment and construction of a drainage ditch pursuant to the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by Chapter 102 of the Laws of 1909, insofar as said petition refers to the straightening of the Big Sioux River, as prayed for in said petition, and as recommended by the Engineer's original and supplemental reports. The consideration whereof having been deferred for further consideration, when Drainage Ditch No. 1 and 2 was established, and said meeting having been adjourned for that purpose. The exact line and width of said ditch was determined by the action of said Board on December 16, 1916, and in general terms is as follows: * * * *

The tract of country likely to be affected by the establishment and construction of said proposed cut offs in the Big Sioux River is in general terms described as all of the lands and property affected by the construction of Drainage Ditch No. 1 and 2, as established by resolution in these proceedings under date of October 3, 1916, and of record in the office of the

County Auditor of Minnehaha County, South Dakota.

400 The separate tracts of land through which said proposed drainage will pass, and part of which will be required therefor, and for dump space, and the names of the owners of said tracts, as appears from the records in the office of the Register of Deeds of Minnehaha County, South Dakota, on August 3, 1916, that being the time of filing said petition, are as follows: * * * *

(Note. Plaintiff is not named nor is any of its property described in this notice.)

All persons affected by said proposed drainage are hereby summoned to appear at said hearing and show cause, if any they have, why the said drainage should not be established and constructed, and all persons deeming themselves damaged by said proposed drainage, or claiming compensation for the lands proposed to be taken for said drainage, are hereby summoned to present their claims therefor at said hearing.

Reference is hereby made to the files in said proceedings for further particulars.

Dated this 16 day of December, A. D., 1916.

401 BOARD OF COUNTY COMMISSIONERS OF MINNEHAHA COUNTY, SOUTH DAKOTA,
By A. G. Risty, Chairman."

Attest:

Harry H. Howe,
County Auditor.

(Seal)

Defendants' Exhibit 31 is the certificate of posting the aforesaid notice, the material portion of which is as follows:

"I, Jerry Carleton, Sheriff of Minnehaha County, South Dakota, do hereby specify that on the 20 day of December, A. D. 1916, I posted three copies of the annexed notice in three places near the route of the proposed drainage mentioned therein, as follows, to-wit:

One on the bridge over the Sioux River between Sections 29 and 32, in Mapleton Township; One on the bridge over the Sioux River on the North Half of Section 8, in Mapleton Township, and one on the bridge over the Sioux River between Sections 29 and 32, in Sverdrup Township; that I also

402 posted one of said copies at the South Front Door of the Court House in the City of Sioux Falls, South Dakota, all in Minnehaha County, South Dakota. * * * *

Defendants' Exhibit 32-A is the affidavit of publication of the aforesaid notice, the material portion of which is as follows:

"C. L. Dotson, being first duly sworn deposes and says: That he is a resident of the County of Minnehaha and State of South Dakota; that the Sioux Falls Press is a daily newspaper of general circulation; printed and published in the City of Sioux Falls, in said County, and State, by C. L. Dotson, and is now and has been such newspaper continuously during all the times hereinafter mentioned; that the affiant is and was during all the time hereinafter mentioned, the publisher of said newspaper, and in charge of the advertising department thereof, and has personal knowledge of all the facts stated in this affidavit, and that the notice and advertisements headed Drainage Ditch Notice No. 1 and 2, a printed copy of which is hereunto attached and made a part hereof, was printed and published in said newspaper for issues. That the first publication of said notice in said newspaper aforesaid, was on Wednesday the 20th day of December, A. D. 1916, and the succeeding publications were severally, on Wednesday, the 27 day of December, A. D. 1916. That the fees charged for the printing and publication of said notice and advertisement in said newspaper as aforesaid, were Ten Dollars and cents, and for this affidavit, Twenty-five Cents, and that the said fees for the printing and publishing of said notice and advertisement, and for this affidavit as aforesaid, have been fully paid; that the full amount of the fee charged for the publishing of the said attached and annexed notice and advertisement, inures to the benefit of the publishers of the Sioux Falls Press; that no agreement or understanding for the division thereof has been made
403 with any other person, and that no part thereof has been agreed to be paid to any person whomsoever. That the said newspaper is a legal newspaper as provided in Session Laws of 1903, and amendments thereto. * * * *

The defendants' Exhibit 32 is the minutes of the Board of County Commissioners of August 10, 1917, adjourning said hearing until August 11, 1917, at which time the Board passed

a resolution establishing said river cut-offs, a material portion of which resolution is as follows:

“Commissioners’ Proceedings.

August 10, 1917.

Pursuant to resolution of July 27, 1917, adjourning and fixing the time of hearing upon the straightening of the Big Sioux River, under the petition upon which Drainage Ditch No. 1 and No. 2 was established, all members of the Board being present, and a delegation of farmers and property owners interested, Engineer L. E. Stephens having made and filed his report of the exact line and location of the several cut offs suggested and recommended, and the Board having heard the protests of those objecting thereto, and the petitioners in like manner having been heard, and the Board having heard the argument of counsel thereon, the further consideration thereof was adjourned to August 11, A. D. 1917, at two o’clock P. M.”

“Commissioners’ Proceedings.

August 11, 1917.

Pursuant to adjournment, The Board of County Commissioners convened at two o’clock P. M. All members of the Board being present, and after taking up and considering the project of straightening the Big Sioux River upon the petition for the establishment of Drainage Ditch No. 1 and 2, heretofore established, and the Board being fully advised
404 with reference thereto, it was moved by C. T. Charnock, and seconded by J. A. Jensen, that the following resolution be adopted:

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, pursuant to the resolution of this Board of October 3, 1916, establishing Drainage Ditch No. 1 and 2, and reserving the consideration and determination of the question of the straightening of the Big Sioux River at several points recommended in the Engineer’s report, that it is the determination of this Board that it will be conducive to the public health, convenience and welfare, and that it is necessary and practicable for the drainage of agricultural lands within the drainage area of said drainage ditch No. 1 and 2; that the hereinafter described ditches straightening the Big Sioux River be established and constructed as a part of the drainage system hereinbefore established, and designated as Drainage Ditch No. 1 and 2.

Be It Further Resolved that the said ditches straightening the said Big Sioux River be, and the same are hereby established, with a bottom width of 20 feet; and a depth not to exceed the depth of the main channel of said Big Sioux River, with a right-of-way for ditch and dump space of 100 feet, one-half on each side of the center line along the lines of hereinafter and particularly described as follows * * * * .”

All of the foregoing Exhibits were offered and received in evidence.

Mr. Ward, as County Auditor of Minnehaha County, identified Defendants' Exhibits 2 and 3, and 33 to 42, both inclusive, as records and files of his office in relation to this drainage ditch proceeding, all of which were offered and received in evidence.

Defendants' Exhibit 2, being a petition signed by O. S. Thompson et al. to abandon the outlet of old Drainage Ditch No. 1 and for the establishment of a new outlet thereto, the material portion of which is as follows:

405 “To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

The undersigned petitioners respectfully represent that they are all residents of the County of Minnehaha, South Dakota, and that each of them is the owner of certain lands situated in said County, in the Valley of the Big Sioux River, all of which lands will be affected by the drainage herein mentioned and proposed.

Your petitioners further represent that it is necessary for the drainage of agricultural lands in the said Big Sioux River Valley, including all of the lands affected by Drainage Ditches No. 1 and 2, as the same have been established and constructed, that said ditches be repaired and put in proper condition and that the same be cleaned, deepened and widened, and that the Levees, dikes and barriers thereof be remodeled, reconstructed and repaired in such places and to such extent as may be necessary in order for said ditches to carry off the surplus water and properly drain the lands affected thereby;

That it is also necessary to permanently close said Ditch No. 1 above the present spillway, or outlet, thereof, at a point in the Northeast quarter of the Southeast quarter of Section 5, in Township 101, of Range 49, where the course of said ditch as now constructed turns from a Southerly direction to

a Southeasterly direction, and to extend said ditch from such point, running thence in a Southwesterly direction, through Covell's Lake in the City of Sioux Falls, across the Southeast quarter of Section 5, the East Half of the Southwest Quarter of Section 8, the West Half of Section 17, the East Half of the Southwest Quarter of Section 18, all in said Township and Range, terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, about 40 rods north of the bridge across said river commonly known as the "12th Street Bridge", situated on the section line between said Section 18 and Section 19.

Your petitioners further represent that the proposed maintenance and repair of said drainage ditches No. 1 and 2, and the extension of said Ditch No. 1, are necessary for the reasons that the present spillway and outlet of said Ditch No. 1, as now constructed and used, is impracticable for the purpose for which it was intended, and if allowed to remain in its present condition, will probably cause large damage to the owners of property adjacent thereto and affected thereby; that it is impossible to put said spillway or outlet in a condition to carry off the surplus water and properly drain the lands affected by said drainage ditches, without causing great damage to the owners of property as aforesaid; that for these reasons it is necessary to establish and construct a new outlet for said drainage ditches, which can be done by establishing and constructing the extension herein proposed.

Your petitioners further represent that the proposed repair and maintenance of said Drainage Ditches No. 1 and 2, and the establishment and construction of said proposed extension of or outlet to Drainage Ditch No. 1 will be conducive to the general health, convenience and welfare of the City of Sioux Falls, and of the inhabitants of the Big Sioux River Valley between the Cities of Sioux Falls, and Dell Rapids, and will prevent the annual loss of many thousand acres of crops in said valley, and will prevent great damage to the lands in said territory, and to the buildings, bridges, highways and other improvements thereon.

Your petitioners further represent that the territory likely to be affected by the proposed repairs to and maintenance of said drainage ditches, and the establishment and construction of the proposed extension to or outlet of said drainage ditch No. 1 includes all of the lands in said Big Sioux River Valley that are affected by said Drainage Ditches No. 1 and 2, as the same have been estab-

lished and constructed, and all of the lands in said valley between the cities of Sioux Falls and Dell Rapids that are subject to overflow by the Big Sioux River.

O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth, Ben Mekvold."

408 Defendants' Exhibit 3, being the bond accompanying the petition of O. S. Thompson, the material portion of which is as follows:

"Whereas, O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth and Ben Mekvold have prepared and executed, and intend to present to the Board of County Commissioners of Minnehaha County, South Dakota, a petition for drainage, a copy of which is hereto attached, marked Exhibit "A", and made a part hereof;

Now, therefore, We, O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth and Ben Mekvold, as principals, and R. J. Huston and Iver R. Peterson, as sureties, do hereby undertake, promise and agree to and with the County of Minnehaha, in the State of South Dakota, that we will pay all expenses incurred in case the Board of County Commissioners of said County do not grant said petition, or the same is denied on appeal.

Dated at Sioux Falls, South Dakota, April 8th, 1916.

O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth, Ben Mekvold, R. J. Huston, Iver R. Peterson.

I hereby approve the foregoing bond and the sureties thereto.

HARRY H. HOWE, County Auditor."

409 Defendants' Exhibit 33, being the order for filing the petition of O. S. Thompson, et al, the material portions of which are as follows:

"Order for Filing Petition for Drainage.

Whereas, O. S. Thompson, and others, of the County of Minnehaha, South Dakota, have this day presented to this Board a petition for the drainage of lands in the Big Sioux River Valley, which lands have heretofore been drained by drainage ditches Nos. 1 and 2, as hereinbefore established and constructed, in which said petition is represented that it is

necessary to permanently close said drainage ditch No. 1, above the present spillway or outlet thereof, at a point in the Northeast quarter of the Southeast Quarter of Section 5, in Township 101, Range 49, where the course of said ditch as now constructed turns from a Southerly direction to a South-easterly direction, and to extend said ditch from such point running thence in a Southwesterly direction through Covell's Lake in the City of Sioux Falls, and across the Southeast Quarter of Section 5, the East Half and the Southwest Quarter of Section 8, the West Half of Section 17, the East Half and the Southwest Quarter of Section 18, all in said Township and Range, terminating at a point on the Big Sioux River in the Southwest Quarter of said Section 18, about forty rods North of the bridge across said river, known as the Twelfth Street Bridge, situated on the Section line between Sections 18 and 19, all in said Township and Range, and said petition having been by this Board examined, and being found sufficient in form, and being accompanied by a proper bond, with sureties approved by the County Auditor;

Now, Therefore, It Is Ordered by the Board of County Commissioners of Minnehaha County, South Dakota, that said petition be forthwith filed with the County Auditor, and a copy thereof be transmitted by said County Auditor
410 to the State Engineer."

Thereafter, on April 12, 1916, a copy of said petition was transmitted to the State Engineer at Pierre, South Dakota, and on May 3, 1916, a resolution was passed by the Board ordering a survey to be made for this proposed extension, and ordering the surveyor to report to the Board upon the length, size, width and depth of the ditch required for this proposed outlet. On May 24, 1916, the surveyor reported his survey, the exact line and width of the ditch, and the amount of right-of-way, together with the estimated cost of the same, and on June 9, 1916, the Board of County Commissioners, by resolution, fixed the exact line and width of the proposed outlet of Drainage Ditch No. 1 and designated the time and place for hearing the same, and designated June 29, 1916, as the time of hearing thereon, and ordered notice to be given. On June 10, 1916, notice dated on that day was published and posted as required by law.

Defendants' Exhibit 42 is the resolution of the Board establishing a drainage ditch as an outlet of Drainage Ditch No. 1 and the abandonment of the old outlet of Drainage

Ditch No. 1, and the repair of Drainage Ditch No. 1 and Drainage Ditch No. 2, the material portions of which are as follows:

"The matter of the petition of O. S. Thompson, and others, representing that it is necessary that drainage Ditch No. 1 be permanently closed above the present spillway or outlet thereof, at a point in the Northeast quarter of the Southeast quarter of Section 5, Township 101, Range 49, and that such ditch be extended from such point running thence in a Southwesterly direction through Covell's Lake, and terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, in said Township, and that it is also necessary that drainage ditches No. 1 and 2 be repaired and put in proper condition, coming on to be heard by the Board
411 of County Commissioners at a meeting of said Board on Thursday, June 29, 1916, pursuant to notice theretofore given, and written objections thereto having been filed by the City of Sioux Falls, the South Dakota Central Railway Company and Catherine W. Peck, and others, and such objections having been presented orally by counsel for the various objectors, and the said petitioners having appeared personally and by counsel in support of said petition, and various parties having filed claims for damages which they claim will be sustained by them by the establishment and construction of said extension or outlet, and said hearing having been adjourned to this 8th day of July, 1916, and this Board having fully heard and considered said petition and all matters, evidence and arguments presented in opposition to and in support of the same;

Now, Therefore, Be It Resolved that the repair and maintenance of said drainage ditches 1 and 2, and the establishment and construction of said proposed extension to or outlet of drainage Ditch No. 1 will be conducive to the public health, convenience and welfare, and it is necessary and practicable for draining agricultural lands, and it is so found.

Be It Further Resolved that said drainage ditch No. 1 be permanently closed above the present spillway or outlet thereof, at a point on the West bank of Drainage Ditch No. 1, 1610 feet North and 58 feet West of the Southeast Corner of Section 5, Township 101, Range 49, where said drainage ditch swings Southeasterly from a Southerly direction, and that a new extension to or outlet of said drainage ditch, commencing at said point and running thence in a Southerly direction through Covell's Lake in the City of Sioux Falls,

terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, in Township 101, Range 49, as described in the resolution adopted by the Board June 10, 1916, be constructed, and that such extension or outlet be and the same hereby is established.

412 Be It Further Resolved that drainage ditches No. 1 and 2 be repaired and put in proper condition, and that the same be cleaned, deepened and widened, and that the levees, dikes and barriers thereof be remodeled, reconstructed and repaired in such places and to such extent as may be necessary, in order that said ditches may carry off the surplus water and properly drain the lands affected thereby, the amount and extent of such repairs to be determined by this Board after an inspection, and, if deemed necessary, a survey of said drainage ditches.

Be It Further Resolved that this Board proceed to consider the claims presented and filed by various persons for damages which they claim will be sustained by them by the establishment and construction of said extension or outlet; that before the assessment of damages this Board personally inspected each tract of land or other property through which said extension or outlet will pass, and that the damages sustained by each tract of land or other property through which said extension will pass, and damages as compensation for the land taken for the route of such drainage be assessed by this Board at a regularly adjourned meeting.

Dated this 8th day of July, 1916.

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The material portion of the judgment in the case of Oluf O. Gilseth vs. A. G. Risty, and others, as County Commissioners of Minnehaha County, South Dakota, et al, Defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, Intervening Defendants, rendered by the Circuit Court of Minnehaha County, South Dakota, upon the 19th day of July, 1921, offered and received in evidence, is as follows:

“The Court having heard and considered the evidence introduced on behalf of the parties, and having heard the argument of counsel, and being fully advised in the premises, and

413 having made and entered its decision in writing, consisting of Findings of Fact and Conclusions of Law;

Now, Therefore, on motion of Messrs. E. O. Jones, R. H. Warren, and Porter & Bartlett, representing the defendants and interveners,

It is hereby Ordered, Adjudged and Decreed that the plaintiff's complaint herein be, and the same is hereby dismissed on its merits."

LEONARD BOYCE, being called as a witness in behalf of the defendants, testified in substance as follows:

My name is Leonard Boyce. I have lived in Sioux Falls for about fifteen years. In 1917 and 1918 I was connected with the Sioux Falls Construction Company, as Superintendent of the construction of the spillway on drainage Ditch No. 1 & 2, constructed by the County Board. As such Superintendent, I made arrangements with the Water Department of the City of

414 Sioux Falls, by which it furnished water to be used in the construction of the spillway on Drainage Ditch No.

1 & 2. The City put in a meter in front of the Penitentiary in a manhole where the main runs into the Penitentiary. We ran a line from there down to the spillway. They knew at the time they put the meter in, the purpose the water was to be used for. We used the water from that connection upon which they furnished the meter in the construction of the spillway. The City rendered bills from month to month, or from time to time for the water so used. These bills were presented to the County Board, and allowed, and warrants were drawn in favor of the City of Sioux Falls, or its water works department, for the amount of these bills, which warrants were delivered by me to the City.

As Superintendent of this work, I had certain steel reinforcing material delivered for that work. Some of it came in on the Milwaukee Railroad, and some on the Great Northern Railroad. There is a spur or sidetrack that extends to near the spillway North of the Penitentiary. I made arrangements with the officers or agents of the Chicago, Milwaukee & St. Paul Railway Company and the Great Northern Railway Company, in the City of Sioux Falls, to have this freight spotted or delivered to us out near the end of this spur near the spillway, and such freight, several car loads, was in fact delivered to us on this spur near the spillway.

During the construction of this spillway in 1917 and 1918, electrical power was used in the work of construction. The Northern States Power Company furnished power or electricity used for power in such construction work. They had a power line that ran by or near the work of construction
415 of this spillway. The agents of the Northern States Power Company made the connections for us so that we used this electrical power which they furnished. They rendered us statements from time to time of the electricity which we used, which statements were presented to the Board of County Commissioners and by them audited and allowed. I think the warrants were drawn direct to these parties.

During the time that I was Superintendent of construction on the spillway on Ditch No. 1 & 2 I saw the City Commission up there looking over the work as it progressed. The whole Commission was together.

Cross-Examination.

My recollection is that they were up there in the Fall of 1917 when we were working on the West side of the bridge on the highway. Possibly October or November, 1917.

416 P. H. EDMISON, being called as a witness on behalf of the defendants, testified in substance, as follows:

My name is P. H. Edmison. I live in Sioux Falls, and am in the transfer, building material and storage business, Manager of the Sioux Falls Warehouse Company. I had the contract for furnishing the cement used in the concrete work on the construction of the spillway on Ditch No. 1 & 2, during the Fall and Winter of 1917 and 1918. This cement was shipped from St. Louis. My contract with the Board of County Commissioners was to deliver this cement on the spur near the spillway North of the Penitentiary. In fulfilling that contract, I discussed with the agents of the Great Northern Railway Company and the Chicago, Rock Island & Pacific Railway Company of the City of Sioux Falls, the matter of delivering this cement on this spur. I discussed the matter with Mr. Pilcher, the Agent for the Chicago, Rock Island & Pacific Railway Company, as to his ability to deliver freight coming in over his line on this spur. He told me that he could not do it, as they had no way of getting it up there. Some cement which came in over the Chicago, Rock Island & Pacific Railroad was taken to the spillway by truck. (p. 237)

I arranged with the Great Northern Railway Company to deliver the cement that came in over their line on this spur

near the Penitentiary for the spillway business, without extra charge on the freight rate to Sioux Falls. Defendants' Exhibits 52 to 65 inclusive, which are freight bills issued by the Great Northern Railway Company for cars of cement shipped from St. Louis, Missouri, to Sioux Falls, dated July 26, 1917, to September 12, 1918, are the freight bills for the cars of cement which were delivered to the County of Minnehaha for its use in the construction of the spillway on Drainage Ditch No. 1 & 2, which cars I had arranged with the Agent of the Great Northern Railroad Company in the City of Sioux Falls, to be delivered at the spillway, and they were so delivered and I paid the Great Northern for its service.

418 W. R. LARSON, being called as a witness in behalf of the defendants, testified in substance as follows:

My name is W. R. Larson. I had the contract with the Board of County Commissioners to deepen and widen these drainage ditches in controversy. The work was done in 1918 and 1919. We started in May, 1918, at the Minnesota road bridge, about one thousand feet from the water works, right across the Sioux Falls & Watertown Railroad, with a trenching machine shipped from Chicago over the Great Northern Railroad into Sioux Falls. It was shipped to their freight depot, and then I made arrangements with their agent here to have it spotted to the side-track over by the water-works. From the bridge we worked North towards Renner, up until about September. In the process we widened, and deepened it, and threw up an embankment on one side. There was a dike on the other side. The following year we did work on this ditch with another machine brought from Sioux City over the Chicago, Milwaukee, & St. Paul Railway, and delivered at Renner. There being no agent at Renner, I arranged therefor, and paid the freight through the Sioux Falls Agent. Those machines extend up, in the air about thirty feet, and this ditch is about 1000 or 1500 feet from the Chicago, Milwaukee & St. Paul right-of-way, or line of railroad. (p. 253)

Stipulation.

At this time make the record show that it is stipulated between the respective parties to these actions, that the intervening defendants are the owners of ditch warrants drawn on Drainage Ditch No. 1 & 2 to the amount alleged in their answers, which have been issued and are now unpaid. (Tr. p. 253).

- 419 C. T. CHARNOCK, being called as a witness on behalf of the defendants testified in substance as follows:

My name is C. T. Charnock, I am one of the defendant County Commissioners in these actions; have lived in Sioux Falls about twenty-five years, and am familiar with the value of farm land in the vicinity of Sioux Falls, also the value of City property in the City of Sioux Falls. I have been over and am familiar with all the lands within the area of Drainage Ditch No. 1 & 2. Prior to fixing the apportionment of benefits thereon on June 10, 1921, I accompanied the Board of County Commissioners in making a personal inspection of all of the lands within the drainage area. The Board selected and determined the benefit to the unit adopted, which unit is situated about three and one-half miles North of Sioux Falls. We placed a value upon this land without the ditch, and a value upon it with the ditch. The difference between these values was the sum of \$25.00 which, in our judgment, was the real beneficial value to this unit produced by the construction of this drainage ditch. The Board applied that unit to all the lands within the drainage area, and used the same method of determining the number of units of benefit to all of the lands affected. In applying this unit towards fixing the proportion of benefits to the Chicago, Milwaukee & St. Paul Railway Company, we first took into consideration the land belonging to the railroad company, the acreage, and we assessed that practically the same as abutting lands, and then we took into consideration the benefits to the grades and the culverts that could be done away with, and to tracks and bridges, etc. That was figured out by our Engineer. The amount or number of units was arrived at by figuring it out in dollars and cents, and then dividing the total amount by the benefit to the unit or twenty-five, thereby obtaining the number of units of benefit which was, in our judgment, received by this railroad company.

- 420 We pursued the same course in fixing the number of units of benefit to the Chicago, St. Paul, Minneapolis & Omaha Railroad Company; also to the Chicago, Rock Island & Pacific Railroad Company; also to the Great Northern Railroad Company. We used the same method in arriving at the proportion of benefits which, in our judgment, the Northern States Power Company received from this drainage ditch. In fixing the proportion of benefits to the Northern States Power Company there were a number of different elements taken into consideration. First, was the dam at Schjodt's. We put that in to control the water there in the

river, and also controlling gates or wiers at Thompson's, and the cut-offs of the river. We also took into consideration the property here in Sioux Falls known as the hydro-electric plant. These benefits, were arrived at by the same process of figuring the total benefit and dividing the same by the value of the benefit to the unit. The number of units which were fixed against these various plaintiffs in these actions represented the judgment of the Board in fixing the proportion of benefits upon the showing that was made, and the computation of our Engineer. We adopted the same process in arriving at the number of units which were fixed against the City of Sioux Falls for benefits. We used the same process all the way through on all the property that was taken under the ditch here.

Cross-Examination.

The unit we used was one acre of agricultural land. In determining the benefit to the Northern States Power Company, the Board took into consideration the dam at Schjodt's, the purpose of which was to prevent the water from the Big Sioux River, where the River had broken through into the ditch, from being diverted into the ditch. The Power Company was objecting to the ditch taking its power. The same condition is true with reference to the controlling gates at Thompson's. The agricultural land had a value placed upon it, and was computed by the acre. I don't mean to say that all the land was assessed at one price. They vary in price according to benefit. Referring to the property of these plaintiffs, the method pursued was to figure the benefit in dollars and cents. The property now before the Court was not computed on the acreage plan. When we were making this assessment, we placed everyone the same value on it.

We did not make any difference whether the property belonged to the City or individuals. In assessing the railroads, we took the land that the railroad companies owned into consideration first, then the railroad itself, and then the culverts and bridges. The acreage that the railroad companies owned was only one element taken into consideration, and it was all assessed upon the unit plan. We took in the mileage but mileage was not the only element taken into consideration. We did not use the valuation of the railroads, but we used the valuation of the benefits that we thought the railroads would receive from it. The Board went over the proposition with the Engineer, and he figured out the method to use and it was approved by the Board. We accepted his figures. The Engineer figured the proportion of bridges that could be saved by di-

verting the water through the spillway, and that was computed in dollars and cents, and divided by twenty-five, which made so many units. The whole system was figured on that plan. All of the different elements of benefit were figured up and added together. The Engineer showed us what benefits this would be, what it would amount to, and that is the way we handled it, by the \$25.00 unit, the same as we did the farms.

422 It was all figured out for us on paper. Then we took the map and travelled over the entire system. The Engineer figured the savings to the bridges, the benefit to the road-bed, and the culverts and the land owned by the railroad. That was all taken in. Those are all the elements I remember.

Q. Now, Mr. Charnock, what was the basis upon which the streets of the City of Sioux Falls were figured on. What were the elements that entered into that?

A. If I remember right they were taken in about the same value as the property abutting.

Q. You mean that all of the streets within the drainage district were figured by the acreage and also other benefits?

A. We didn't figure the lots by the acre.

Q. I am not talking about lots, I am talking about streets?

A. When you get to the streets they are in where lots are laid out.

Q. I am asking about the city property or streets?

The Court: As I understand the witness, they did not consider that upon the acreage basis at all. Am I right?

The Witness: Yes sir.

Q. Upon what basis was the benefits figured?

A. It was figured on the valuation.

Q. Valuation? A. Yes.

Q. Upon the acreage valuation?

A. We figured if you kept the water off this lot you had benefitted it so many dollars.

Q. I am asking about the city streets.

A. I am telling you that we took the streets by the same value.

Q. And figured them in acre valuation?

A. No, not in acre valuation, lot valuation.

Q. Upon what basis?

423 A. I don't know as I can explain it so you can understand it.

Q. What benefits did you figure out that the city would derive to their streets from this spillway and ditch?

A. The drainage. Keeping the water off of them would be certainly a benefit to the streets as well as abutting property.

Q. Upon what basis, what theory?

A. I cannot tell you just how much.

Q. Upon what basis did you figure, for instance, Sherman Park?

A. I believe Sherman Park was run in by the acre.

Q. As agricultural land?

A. Somewhere near that.

Q. Was the streets that you just referred to also figured upon the basis of agricultural land?

A. Whenever they were on that, they were assessed along about the same as the property where the street was located.

Q. As agricultural land?

A. You wouldn't call city lots agricultural land?

Q. I am asking you what you done?

A. I am telling you we assessed the street along with the property where it laid.

Q. As agricultural land?

A. No, not as agricultural land.

Q. What about Phillips Park, how did you assess that?

A. There is only a portion of Phillips Park, I think, taken in. That is the north end.

424 Q. Upon what basis did you put that?

A. That was the same way.

Q. In fact, you assessed the city property, all of it, the same way you have described it here?

A. I think so.

425 HERMAN RETTINGHOUSE, being called as a witness on behalf of the defendants, testified in substance as follows:

My name is Herman Rettinghouse. I am a civil engineer and reside in Sioux Falls. I graduated in 1881 and came to the United States in 1882, and in the following year engaged in engineering work; was employed by the Milwaukee, Mitchell and Western Railway, which is now a part of the Chicago & Northwestern system, as an assistant and gradually advanced into higher positions until 1893, at which time I engaged in private work in Ashland, Wisconsin, where I was city engineer for three years. Also was engineer for two railroads and in the fall of 1897 again engaged with the Chicago & Northwestern Railway as assistant engineer and was promoted to superintendent of bridges and building on the same road in 1900, in which capacity I served for five years;

and from 1905 to 1907 was employed by the Wisconsin Central Railway Company as division engineer; had charge of the engineering construction work and maintenance of the entire road, and on January 1, 1907, again engaged with the Chicago and Northwestern as division engineer of the Northern Iowa and Sioux City Divisions, which position I held until the spring of 1913, when I was made division superintendent of the Iowa and Minnesota division of the Chicago & Northwestern. I remained there until November, 1913, and was then promoted to chief engineer of the Chicago, St. Paul, Minneapolis and Omaha, a part of the Chicago & Northwestern system. I retired from that service on March 1, 1920, at which time I was placed on the pension roll because of my impaired health. Since April 1, 1920, I have been a resident of Sioux Falls and have engaged in private practice as consulting engineer and senior member of the firm of Chenoweth & Rettinghouse, up to the present time. My first experience in public drainage work was in 1905 in a project which was affected in the Wisconsin Central Railway and another similar project in Southern Wisconsin; January 1, 1907, while in the service of the Chicago & Northwestern as division engineer in Iowa, which comprised practically the entire state covered by that railroad, the drainage work was very extensive. It was the principal part of my duties to make myself familiar with and handle the drainage problems which came up constantly. During this time we had from one hundred to one hundred fifty drainage problems of various magnitudes. When I became chief engineer of the Omaha Railway, we had a number of drainage problems in the states of Wisconsin, Minnesota, South Dakota and Nebraska. It was my duty as chief engineer to make myself very familiar with them and to cover all the phases of the problems as to benefits, damages and the manner of assessing benefits and damages. In November, 1920, my firm was engaged by the Board of County Commissioners of Minnehaha County, to make a topographical survey of the district covered by Drainage Ditch No. 1 and 2 for the purpose of preparing a correct map and furnishing data to the Board as would enable it to place the proportional benefits on the land and interests affected. Defendant's Exhibit 1 is the map prepared by my firm, which shows the topography of the country adjacent to and affected by Drainage Ditch No. 1 and 2 of Minnehaha County. Drainage Ditch No. 1 and 2 at its initial point is not exactly in the Sioux River. A small creek connects with the Sioux River near the Southwest corner of Section 29, Township 104, Range 49. The initial point of that particular section which we term sec-

tion No. 3 is located at that point, a matter of five or six hundred feet from the river proper. There are controlling works and gates there which enable the ditch to be closed off from the river or from the creek, or opened and at flood time part of the water taken out of the river. Section No. 3 is located along the lowest land west of the Sioux River. The
 427 land is naturally down lower than the banks of the river proper, a great deal in some instances. The land west of the ditch gradually rises as you go away from the ditch until you get to the foothills. The surface water on the outside of this ditch can most assuredly get into the ditch. The ditch was constructed for the prime purpose of draining this section of the country and inlets have been made at various points, at roads and intervening points, to permit this surface water to drain into the ditch.

This third section terminates in connecting with the river on the east and west line of Section 18, Township 103, Range 49, about a thousand feet west of the east line of Section 18. This ditch connects with the river as stated and the river from that point to a point on the southeast quarter of Section 20 has been straightened at various points, being practically canalized. At the point spoken of there is a bayou or an old portion of the river bed, which is partly filled up along the north, due to the fact that the river has been straightened to the west of it, and Section No. 2 connects with this bayou about eight hundred feet east of the river proper. The ditch then extends parallel to the Milwaukee railway to near the junction point of the South Dakota Central line. At that point it diverges to a distance of about sixteen or seventeen hundred feet, running practically that distance parallel and in a southerly direction until it intersects the old bed of Silver Creek. It then follows Silver Creek in a southeasterly direction, cutting out all bends in it until it reaches a point at or near the Section line between Section 28 and 29, and runs in a southerly direction about a thousand feet parallel to the Milwaukee railway again until it reaches a point about a quarter of a mile north of the city limits, from which point it runs in a southeasterly direction to its terminus in the spillway. Throughout Section 2 which is described, the ditch runs in the lowest part of the country east of the river and serves the
 428 purpose of a drainage ditch as well as for an overflow from the river. It was put in for the dual purpose of serving as an overflow and as a drainage ditch. You will notice on the map that Silver Creek runs in a very circuitous route along the ditch and it terminates in this ditch, so that

the waters of Silver Creek are more quickly disposed of than before and it therefore assists in draining the land adjacent to the ditch and Silver Creek and the same is true of the lands between the ditch and the river. The ditch assists in draining territory which is tributary to Silver Creek, which has its source north of the initial point of Section 2 of the ditch. The dam at Schjodts is about eight hundred feet from the former end of the lateral ditch constructed there. This dam is about thirteen hundred feet from the present cutoff channel of the Sioux River. There are two controlling works; the one mentioned composed of a gate at the initial point of Section 3. At the initial point of Section 2 there is a concrete bridge with a wier under the same which permits the water to rise to a certain point before it enters into the ditch and thereby is retained in the river proper. This was installed for the purpose of controlling the rise of the water in the river. In making of the survey of which I had charge, I made frequent trips
429 over the territory in order to familiarize myself with all the elements that might come into consideration and particularly as to the relative benefits derived, bearing in mind that it was necessary to arrive at some certain basis so as to be able to make the proper recommendations to the Board. In going over the territory, I came to the conclusion that at the location of this unit, it was about as good an illustration as could be found along the entire district, and I selected this unit for my recommendation to the Board. On Section 2 of this district, which terminates in the Sioux River, there are openings left at all necessary points to drain off the surface water and carry it into the ditch. After we had made our report
430 to the Board and I can best illustrate it by reading the sentence, "We also submit as an aid in your work of equalizing the benefits, a complete list of all the lands with the acreage of each parcel and proportionate benefits. We have made a thorough investigation and have minutely looked over all of the affected lands. In consideration of the proportion of benefits, we have selected a particular tract for a unit, one acre, more particularly described later, in the west half of the northwest quarter of Section 29, Township 102, Range 49". Together with that report we submitted a recommendation as to the proportional benefits and after the board had received this report, we made a trip over the entire district lasting several days. We had one of the maps with us and we viewed all the lands and all of the other points where other benefits were to be proportioned. The particular percentages of the different parcels of land came under consideration and were pointed out, and if a dispute arose as to whether

or not it was the proper amount of percentage, it was corrected and agreed upon right there by the Board, so that at the conclusion of our inspection the Board was familiar with all of the facts of the situation as I was myself. We used this unit selected as one and compared the other real estate with it. It was decided by the Board that the acre in question was worth one hundred dollars prior to the improvements and that it was worth one hundred twenty-five dollars subsequent to the improvements. Therefore the actual value of benefit to the unit selected was twenty-five dollars. All the agricultural land was assessed in relation to this unit. Many of the lands were only 30 or 40% depending upon the amount of benefit derived, as compared with this unit, being one hundred per cent. There were other lands that were as high as three hundred and three hundred fifty per cent of this unit. I am familiar with the cost of construction and upkeep of highways. In arriving at the benefit to the highways within this drain-

431 age area we estimated the benefits in this way. There is a certain amount of annual maintenance necessary for any road, and there is more than that amount necessary under flood conditions. That is to say, a road that is periodically flooded as against a road that never is flooded. The difference in the estimated cost of maintenance was capitalized, or represented the interest on a certain sum of money, and we consider the capitalized portion as a real benefit. We then, after obtaining that result after making a great many calculations, taking into consideration the various locations, some of them benefitted more than others.

We divided the amount arrived at by the value of the unit of \$25, thereby obtaining the number of units as a proportional benefit for these roads. The sum we divided by the unit represented the capitalized value to that part of the highway; we applied the same method to the streets and highways of the City of Sioux Falls. We did not apply the acreage basis to the city property, excepting possibly the grounds where the water works are located. In applying the benefit to the unit and what the Board took into consideration as elements of benefit to the Milwaukee Railway Company, we took into consideration the fact that in the first place there were practically three elements. First was the right-of-way on the acreage basis, which was estimated in proportion to the adjacent lands. Second, that it was possible to shorten or abandon certain bridges. In order to determine the benefits derived therefrom is simply a mathematical proposition. It costs a certain amount of money each year in order to maintain a bridge, whether it is a pile bridge or a steel bridge. We know how

long these structures will last. We figure the cost of a bridge and divide it by the number of years in order to get the amount that is necessary to be expended each year. Taking the amount in dollars and cents multiplied by the length of the bridge and divide that and capitalize that at 7%, which is the usual rate of interest, and that determines
432 the amount of benefit. This was the second element.

The third element is the fact that by reason of the flooding of the territory in which railroads are located, washouts often occur. We obtained data and from my personal knowledge and experience I have a very good idea of what it costs to repair washouts periodically appearing and we estimated as close as possible how much it would amount to every year and capitalized that amount again.

Again as an additional element, a road-bed is solidified or made stronger by not being subject to floods. A road-bed that is constantly or for great lengths of time subjected to submersion is certainly weakened, and again, so far as humanly possible, we figured the amount of benefits in dollars and cents and after getting all of these results or capitalized amounts, we divided that by twenty-five as our measure and determined the number of units of benefit. That system and general method and plan was used to determine the amount of benefits that each railroad received from these separate elements. There were three elements of benefit so far as the Northern States Power Company is concerned. One of them was the fact that through the construction of the wier at the initial point of section 2 and through the construction of the dam commonly known as Schjodt's dam and I believe some dike work done at other points, the power company was assured of a constant flow of water or a normal stage of water. The second element, that through the diversion of a part of the water of the Sioux River through this drainage ditch, which has been estimated at from twenty-six hundred to three thousand second feet, as against a total flood condition of six thousand feet, and all the way from 6000 to 10000 second feet, a benefit was created in that much water being taken away from the tail race and lowering the available head at
433 the power company's plant. In determining what proportion that would be, I was largely guided by the report made by Mr. Link, in which the results of his investigation were given and the amount of second feet of water in flood stages of the river at certain periods mentioned. I was also dependent upon the information and investigation made by Mr. Shenehon, who designed the spillway, and I came to the

conclusion as a fair proportion of the waters diverted, we could assume one-third of the entire river from the end of section 2 in lowering the head of the hydro electric plant, through the flood waters; also the lay of the land opposite the hydro electric plant is such that all of the flood waters, after passing over the dam, must pass through the tail race. All these elements were considered in the determination of the benefits accruing to the Northern States Power Company.

Q. Just a moment, let me call your attention to certain cut-offs in the river. What if any?

A. I said there were three elements and I only mentioned two. The other is the straightening of the river which has been done to a large extent between the upper end of Section No. 2, at this point clear down to this point near the Watertown & Sioux Falls Railway. The velocity of the water was greatly increased of the waters flowing through the river, and it thereby shortened the flood period, in that the water passed through the river much quicker than it did before. The total amount of water that is collected in the initial point of these cutoffs is hastened down the river past the Northern States Power Company's Plant. The ditch takes one third out of the river. I have estimated it as closely as humanly possible at one-third. It may be more. These were the elements we considered in apportioning the benefits to the hydro electric plant. Using these elements, we estimated the amount that would be saved by the power company through the fact
434 that the head was not lowered to that extent and capitalized that amount. The power company, by by-passing these flood waters, would have a constant aggregate output of hydro electric power and in season other than flood seasons the controlling works and dams keep all the water in the river that should be there and pass it around over the power company's turbines, insuring to them a constant flow even at a low stage of water in the river. (Tr. p. 285) The Great Northern had 2.4 acres of right-of-way which the Board considered benefited by reason of this ditch. They have one-fifth of a mile of track, two bridges protected, and 315 feet approximately of bridge that might be abandoned. The Chicago, Rock Island and Pacific has 12-1/8 acres of right-of-way that is benefited, one mile of track and two bridges benefited to be shortened, together approximately 230 feet. The Chicago, Milwaukee and St. Paul Railway has 172 acres of right-of-way, 14.2 miles of track, two bridges protected, one bridge shortened one hundred feet and one bridge of 176 feet abandoned, all benefited thereby. The Chicago, St. Paul, Minne-

apolis and Omaha has two and one-fourth miles of track, 27 acres of right-of-way, 405 lineal feet of bridges abandoned and two bridges protected.

435 These items I have mentioned, in my opinion, were benefitted by the construction of this ditch and the diverting of the water as I have testified. There were three elements in regard to the assessment of the city of Sioux Falls. First, the streets, estimated at about 14 miles of streets within the drainage district. They are benefitted in the same manner as I have explained in regard to the county and town roads, although the benefits were more varied on account of the streets being built of different character. The second item was the parks. We figured that from the diversion of the flood, the annual maintenance of the parks was reduced, that is to say there was less work to maintain the grounds as compared with the ground that was flooded. Another item was the benefit to the water works. It seems to be a fact that through the placing of the spillway the life of the water works was saved, insofar as productiveness of the wells is concerned. Another item is that during flood conditions, the water works were unproductive. We have estimated a certain number of days each year that the water works were out of commission. These wells were flooded by surface water and made them unsanitary and unfit for drinking purposes. We figured the amount that that would bring and capitalized the amount same as the capitalization of the streets and parks and divided that amount by twenty-five in order to arrive at a certain number of units. From my experience and the facts and data that I have been able to gather, the benefits that I have mentioned are direct benefits to the railroad companies and their properties by reason of the construction and maintenance of this ditch; and the benefits which I have outlined to the city and Northern States Power Company were direct benefits to them. After determining the amount of the units and actual amount of money necessary to be raised, that amount is divided by the number of units to produce the value of a unit; and by that process we reduce the actual value of the unit down proportionately to each party affected.

436 Q. You reduced the valuation down proportionately to each property affected whether it was railroad or ranch property? A. All treated alike.

Q. And that, in the final analysis will be the assessed benefit after being equalized? A. It will.

Q. Calling your attention to the fact that the river continues around the city for some miles beyond the outlet of the spillway, what is the effect of by-passing this water upon adjacent lands, starting at the city limits on the north around this city until the ditch dumps the water back into the river. Is that a benefit or not?

A. It constitutes a direct benefit. The same benefit as to lands farther up the river.

Cross-Examination,

437 By Mr. Campbell:

When I speak of the ditch diverting something like three thousand feet of water, I have reference to the discharge capacity of the ditch at its lower end; I couldn't tell what proportion of the water came out of the river during the flood stage; I should think a majority of the water came out of the river; I don't know the capacity of the ditch at its upper end; we haven't figured that; the ditch does not divert water from the river at any other point than that; I do not know what the amount is that is diverted there; the wier that I speak of down here that controls the flood of the river is constructed to keep the water from going into the ditch at normal stage; if the ditch were not there, the waters would go down the river just the same. The second element that I said I took into consideration, that is, the diversion of the flood of the water would lower the tail race of the Northern States Power Company at flood times to the extent of the water that was diverted; I couldn't tell you how much that would be; I couldn't tell you how many kilowatt hours of output the plant would gain by reason of that diversion; that is a matter in hydro-electric engineering that I have not attempted to qualify; the value of that increased head would be measured by the value of the increased output from the hydro-electric plant; this answer is based upon the assumption that it is cheaper to produce electric current from a hydro-electric plant than from a steam plant.

438 By Mr. Grantham:

I didn't know I determined the capacity of the stream; we have several cross sections taken at various points of the ditch and the river as well; I couldn't tell you whether I have a cross-section of the ditch at about the point where the ditch that runs to the spillway is fed by the river; we have taken cross sections of every half mile; the ditch is not uniform all

the way; I have no idea at all of the size of the stream; in testifying here that the ditch carries one-third of the water, I was basing my conclusion upon the investigations made; I determined on my survey the high water mark; the [height] above the banks of the stream of the high water varies at various points; the dotted line here on the map shows the high water line; at an elevation of 1438, the [height] of the high water line is about ten feet above the banks of the river; the water at that point would be about 8000 feet wide on the surface; it is impossible for anyone to tell you off-hand just what the average depth of water would be there without showing cross-sections at every point. I have no idea.

Q. How did you determine the capacity or amount of water carried if you didn't know the amount of water in the stream? A. I was not engaged for that purpose.

Q. You don't know as a matter of fact the amount of water that is carried down the stream in flood time?

A. I do not.

Defendant rests.

439 Endorsed: Filed in the District Court on Jan. 10, 1923.

440 (Approval of statement of evidence by District Judge.)

The above named appellants having presented and filed in this Court their statement of the evidence in the above entitled cause, and the above named respondents having filed their objections thereto and asking that part of said statement be stricken and said respondents' statement of said evidence be substituted in lieu thereof, and the appellants having filed their objections to said substituted statement of said respondents, and said differences having been submitted to the above named court, and said statement having been made up and completed in conformity with the directions of said

441 Court,

Now Therefore, It Is Ordered that said statement so made in conformity with the order of this Court and hereto attached be and the same is hereby approved as a true and complete statement of the evidence in this cause.

By the Court:

JAS. D. ELLIOTT, Judge.

Attest:

(Seal of Court) Jerry Carleton, Clerk.

Endorsed: Filed in the District Court on Jan. 10, 1923, at 2. P. M.

442 (Clerk's Certificate to Transcript.)

United States of America,
Southern Division,
District of South Dakota—ss.

I, Jerry Carleton, Clerk of the District Court of the United States of America, in and for the District of South Dakota, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals, for the Eighth Circuit, that the foregoing, consisting of 441 pages, numbered consecutively from 1 to 441, inclusive, is a true and complete transcript of all of the record, process, pleadings, orders and final decree as enumerated in the Praecipe of the parties appellant and the Praecipe of the party appellee to this cause filed herein, directing the Clerk what parts of the record and papers to be included within such transcript, as fully as the same appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original Citation, together with the affidavit of service thereof, and in addition thereto a copy of said Praecipes and all written opinions of the Court filed in said cause.

In Testimony Whereof, I have hereunto
Seal set my hand and affixed the seal of
U. S. Dist. Court, said court, in the said District, this
Dist. of South Dakota. 15th day of March, A. D. 1923.

JERRY CARLETON, Clerk.

Filed Mar. 20, 1923. E. E. Koch, Clerk.

292 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

United States Circuit Court of Appeals, Eighth Circuit.

A. G. Risty, et al., as County Commissioners, etc., et al., Appellants,

No. 6317. vs.

Great Northern Railway Company.

Appeal from the District Court of the United States for the District of South Dakota.

(Order of Submission.)

Memorandum of Clerk:

On the 17th day of December, 1923, this cause, together with causes Nos. 6312, 6313, 6314, 6315 and 6316, was submitted to the United States Circuit Court of Appeals for the Eighth Circuit and a full copy of the order of submission having been included in the transcript taken for the Supreme Court of the United States on appeal and an application for writ of certiorari in cause No. 6312, A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, vs. Chicago, Rock Island and Pacific Railway Company, Appellee, the same is omitted from the transcript in this cause, No. 6317.

(Opinion.)

Memorandum of Clerk:

On the 18th day of March, 1924, an opinion of the United States Circuit Court of Appeals for the Eighth Circuit was filed in causes Nos. 6312 to 6317, inclusive, and a full copy of the opinion having been included in the transcript taken for the Supreme Court of the United States on appeal and on application for writ of certiorari in cause No. 6312, A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, vs. Chicago, Rock Island and Pacific Railway Company, Appellee, the same is omitted from the transcript in this cause, No. 6317.

293

(Decree.)

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1923.

Tuesday, March 18, 1924.

A. G. Risty, et al., as County Commissioners of Minnehaha County, South Dakota, defendants and Minnehaha National Bank of Sioux Falls, South Dakota, et al., intervening defendants, Appellants,

No. 6317. vs.

Great Northern Railway Company.

Appeal from the District Court of the United States for the District of South Dakota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of South Dakota, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Great Northern Railway Company have and recover against A. G. Risty, et al., as County Commissioners of Minnehaha County, South Dakota, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al., intervening defendants, the sum of Twenty Dollars for its costs herein and have execution therefor.

March 18, 1924.

294 (Petition for Appeal to Supreme Court, U. S., Assignment of Errors and Allowance of Appeal.)

(Petition for Appeal and Allowance thereof.)

To the Honorable Presiding Justice, or any of the Judges of the Circuit Court of Appeals of the United States, for the Eighth Circuit.

Now comes the above named appellants, by their solicitors, and complain that in the record and proceedings, and also in the rendition of the Decree of the United States Circuit Court of Appeals, for the Eighth Circuit, sitting at St. Louis, in the State of Missouri, in the above styled and numbered

cause, on the 18th day of March, A. D., 1924, affirming the Decree of the United States District Court, for the District of South Dakota, Southern Division, in said cause, manifest error has intervened, to the great damage of the petitioners. In substance, said errors are these:

1. Appellee was given said relief by collateral attack, by means of a Bill of Equity, when it had an adequate remedy at law which it could pursue, at its election, either in the Courts of the State of South Dakota, or in the Federal Court.

2. It was given the relief aforesaid, despite the fact that the record shows without dispute that the appellants, the Board of County Commissioners, in establishing the said new project, and in attempting to obtain said contribution from appellee, acted strictly in accord with the statutes of the State of South Dakota governing the establishment of such new project.

3. Appellee got said relief, though, in addition to the fact that the said Board had in fact thus complied with said statutes of the State of South Dakota, it was the settled law of the said State at the time the Circuit Court of Appeals acted as aforesaid, that the doings of said Board with reference to the aforesaid project were in compliance with
295 the statutes of South Dakota, as construed by the highest court of that State. It was further settled at said time by the highest court of the State of South Dakota, that the very project at bar was the formation of a new drainage district, or ditch. And the Circuit Court of Appeals erred in disregarding the interpretation of the applicable statutes of the State of South Dakota as formulated by the highest court of that State, and substituting its own interpretation for that of said highest court of that State.

4. The Circuit Court of Appeals erred in granting the relief which it did grant and affirm, because neither the pleadings nor the evidence warranted such relief, or any relief, and because its finding that appellee was entitled to the relief which it obtained, is contrary to the pleadings and to the evidence, and contrary to and unwarranted by the law.

5. Said Circuit Court of Appeals erred also for the reasons set out in the assignments of error filed herewith.

The appellee invoked the jurisdiction of said United States District Court, as set out in its bill of complaint, on the ground that it, the appellee, was a citizen of the State of Minnesota; that the appellants were citizens of the State of South

Dakota, and that more than \$3,000.00, besides costs, was actually in controversy. It did not invoke the jurisdiction solely on the aforesaid grounds, but, in addition, asserted in its bill of complaint that appellants were not proceeding in accordance with the requirements of the applicable statutes of the State of South Dakota; that if it were assumed they were acting in compliance with said statutes, such statutes themselves were unconstitutional and void, and violative of the Constitution of the United States, and amendments thereto, and that the action of appellants was depriving appellee of its property without due process of law, in violation of said Constitution and amendments thereto.

296 Therefore, your appellants and petitioners say that this cause and matter is not one in which the decision of the said Circuit Court of Appeals of the United States is made final, and say further that the controversy between appellants and appellee involves an actual controversy over more than One Thousand Dollars, besides costs.

Wherefore, petitioners pray for an allowance of the appeal, to the end that the cause may be carried to the Supreme Court of the United States, and petitioners pray for a supersedeas of said judgment, and such other process as is required to perfect the appeal prayed for, to the end that the errors therein may be corrected.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Solicitors for Appellants.

Appeal and supersedeas allowed, and bond fixed at the sum of one Thousand and no/100 Dollars (\$1000.00), conditioned as the law provides, this 31st day of May, A. D., 1924.

WM. S. KENYON,
Judge of the Circuit Court of Appeals
of the United States, for the Eighth
Circuit.

Assignments of Error.

Now on this 31 day of May, 1924, comes A. G. Risty et al. as County Commissioners, etc., et al., Appellants, by their solicitors, Benj. I. Salinger, Elbert O. Jones and Norman B. Bartlett, and in connection with their petition for appeal to the Supreme Court of the United States say that in the find-

ings, judgment and decree entered in the above cause on the 18th day of March, 1924, manifest error has intervened, to the injury, wrong and prejudice of this appellant, and that the same is erroneous and unjust to appellant;

1. Because the Circuit Court of Appeals failed to follow the construction of the South Dakota Constitution and statutes as pronounced by the highest court of the state
297 and did its own construing of said state law and based its affirmance of the decree of the District Court on a construction on its own part, which is in conflict with the construction of the highest court of the state.

2. Because it was based on the reasoning that appellant Board had no authority to make an assessment except in aid of a drainage project to drain agricultural lands and that said Board had no authority in law to establish a drain except for the drainage of agricultural lands.

This is erroneous and the interpretation of the Constitution and statutes by the Circuit Court of Appeals is erroneous because it is and for a long time has been the settled law of South Dakota as declared by the highest court of the state in construing its said Constitution and statutes that a Board such as appellant Board [it], is by such Constitution and statutes authorized to establish and construct a drain for a public purpose and that such public purpose included but was not limited to the drainage of agricultural lands, and that such authority existed as to such drainage as the very one at bar is, and it is undisputed in the evidence that one object of this project was to drain agricultural lands.

3. Because it is not only a fact that the highest court of the state has ruled in construing the Constitution and statutes of the state of South Dakota that the drainage ditch at bar was lawfully established and that the acts of appellant Board were lawful, but the record shows both facts without dispute; and the Circuit Court of Appeals' affirmance is despite such ruling and despite said state of the evidence.

4. Because there is no evidence in the record to show any fraud or subterfuge on behalf of the appellant Board or anyone at all in the establishment of this new drainage ditch; and there is absolutely no evidence in the record that appellee was prevented from making a full and fair defense to such establishment in the proceedings had upon notice given by the appellant Board by which this new drainage ditch was established. Unless appellee was by some subterfuge prevented from making a full defense to the establishment of this

298 project at the time of its establishment, the mere statements now that it was established by subterfuge is of no avail to it in this collateral attack.

5. Because the affirmance was based on an interpretation of the statutes of South Dakota by the Circuit Court of Appeals that such statutes did not permit or authorize appellant Board of County Commissioners to establish and construct a new drainage ditch over the line of two older ditches, which new project contained a materially larger area than the combined areas of such old ditches and called for cleaning out, widening, deepening and diking of the old ditches to double their former capacity—the construction of river cut-offs to accelerate the flow of water therein, and the installation of a new and larger spillway, all at a cost of more than double the cost of the original ditches; which interpretation was contrary to the interpretation given to such statutes by the highest court of the state of South Dakota in this very drainage project.

6. Because the statutes of South Dakota, as interpreted by the highest court of the state, permit and authorize the appellant Board to establish over the line of one or more old drainage ditches a new drainage project containing a materially larger drainage area than the combined area of such old ditches—with additional river cut-offs—new and larger spillway, and a cleaning out and deepening, widening and diking of the old ditches to double their former capacity, at an expense of more than double the cost of the original ditches; and the undisputed evidence in this case shows the proceedings of the appellant Board sufficient under such statutes to establish and construct such new drainage project and make an apportionment of benefits for the payment of the cost thereof, and did not warrant the finding and conclusion of said Circuit Court of Appeals that said proceedings were in fact for repair and maintenance only.

7. Because it is based on the holding and reasoning that appellant Board had acted without authority from and had not complied with the provisions of the statutes of
299 South Dakota regulating the maintenance and repair of ditches already established. The appellees, City of Sioux Falls, C. Milwaukee & St. P. Ry. Co., and the C. St. P. M. & Omaha Ry. Co., conceded that the project at bar was the creation of a new ditch and a new project. That fact is established by the undisputed evidence as against all of the appellees. It is undisputed in the evidence that there was a full compliance with every statute dealing with the establish-

ment of a new ditch. Therefore, the affirmance was given because there had been a failure to comply with statutes that had nothing whatever to do with the establishment of a new ditch or assessing for the cost of its construction. The court disregarded that the relevant statutes had been complied with and based its action wholly on the fact that statutes that had no application had not been complied with.

8. Because the appellant Board to whom had been delegated by the statutes of South Dakota the authority to determine the purpose and character of this drainage project had, after notice and hearing, determined that this drainage project, among other things, was for the benefit of the public health, welfare and convenience and was necessary and practicable for draining agricultural lands, from which determination no appeal was ever taken; and the highest court of the state of South Dakota was held in interpreting such statutes that such determination is final, no appeal from the same ever having been taken.

9. Because the notice dated September 15, 1916 and the hearing held pursuant thereto on October 2, 1916 was a notice to and an opportunity to be heard by appellee on the formation of this new drainage project with an enlarged area subject to benefits and that appellees property was included therein, and gave to it its day in court and its opportunity to contest the establishment of said drainage project, the legality thereof, the necessity therefor, the character and purpose thereof, and it having waived the same and defaulted therein and not having appealed from said determination, is bound thereby.

10. Because what was in effect done was to restrain
300 legislative action on the part of the appellant Board acting in a legislative capacity under delegation from the legislature of the state. The legislature itself could have by enactment of the statute done everything the Board did or was proposing to do, and it should be conceded that the legislature could not have been enjoined from enacting such a statute. The only difference is, that the Board was bound to give certain notices and hearings before any assessment could become a lien, and the Board did what it was bound to do.

11. Because the proceedings at bar were proceedings in rem, for the purposes of taxation, and dealing in this matter or any review of the same involves property rules, over which the courts of the state are the final authority, and both resi-

dent and non-resident property owners, must at least in the first instance, resort to and exhaust the remedies provided by the statute in the state tribunals for reviewing such controversies before they may enter either the state or the federal courts at all.

12. Because although where a resident of a state may enter the courts of a state, one who has diversity and a controversy involving more than \$3,000.00 need not submit himself to those state courts but may at his election enter the federal courts, yet in a proceeding in rem like a drainage project the resident of the state must first submit to administrative review and may not enter the courts of his state without first exhausting such administrative review, and the non-resident cannot disregard such administrative review and have his proceedings in rem reviewed in the first instance in the federal courts. The non-resident can enter the federal court only when the resident of the state can enter the state court.

13. Because the injunction was granted on the reasoning that one should not be compelled to appear at the hearing to equalize apportionments for the reason that it would be had before said Board and said Board had no authority whatever to act—that one should not be compelled to submit to a hearing before a mere trespasser. This disregards, 301 first, that the mere assertion that the Board was without authority did not justify the failure to appear at said hearing, and, second, it disregards the decisions of the highest court of the state that the Board was acting on full authority, and, third, it appears by the undisputed evidence that they had full authority.

14. Because the hearing enjoined was one to be had for the purpose of equalizing a tentative estimate only which had been made by the appellant Board. This estimate was not final and additional acts by the Board were necessary after such hearing was held before any tax, assessment or servitude could become operative. Manifestly the holding of such hearing could not give rise to a multiplicity of suits as against this appellee, no matter how many suits might arise as to other parties. Manifestly the proposal to hold such hearing cast no cloud on title, because other acts by the Board were necessary before any amount that was finally fixed could become a tax, assessment or servitude upon its property, and there was no evidence at all that there would result irreparable injury to appellee. This is specially applicable to the appellee City of Sioux Falls and to the four railway company

appellees, because even if an assessment had been made and a tax levied, it would have created no lien upon their property.

15. Because appellee made no case under any acknowledged head of equity jurisdiction and in the essence, based its claim for relief upon the assertion that it was threatened with exaction of an illegal tax. At any rate there could be no right to have equitable relief until such time, if ever, as the threatened tax was about to be collected by taking from appellee the title to the lands affected by the assessment. Up to that time nothing could happen more than to exact a sum of money for taxes which were illegal taxes, and for that wrong or threatened wrong the law provides an adequate remedy either in the state or federal courts.

16. Because if, as is contended by the Circuit Court of Appeals, the appellants acted utterly without authority of law and were therefore naked trespassers, that fact 302 gave appellee an adequate remedy at law in either the federal or state courts at their election, to-wit, to sue in trespass—hence appellee's bill in chancery should not have been entertained. If, on the other hand, the acts of the appellants were in all respects lawful, the appellee was not entitled to any remedy either at law or in equity.

17. Because, assuming that appellee could enter the federal court at all, it had at all times a plain, adequate and complete remedy at law in the premises in said courts by appealing from the establishment of the ditch to the circuit court of the state and thence removing the entire controversy involved, including the making of assessments, to the law side of the federal courts, where a trial de novo could be had. Instead appellee lodged a bill of complaint seeking an injunction.

And while it may be true appellee has waived its right to this appeal from the establishment of the ditch, that does not alter the fact that it had no right to enter a court of equity on the ground that though it had at one time the right to thus appeal to and have review in the federal court and a trial de novo there on the law side, by its default and waiver it had voluntarily lost that right.

The right to enter chancery cannot be created by waiving or failing to exercise an adequate remedy at law.

Passing that, the appellee had the right to appeal from the action of the appellant Board as to apportionment of benefits

directly to the circuit court of the state and thereupon to remove this very controversy for review on the law side of the federal District Court and there have a trial de novo.

18. Because, assuming for the sake of argument that the District Court and the Circuit Court of Appeals had authority to pass upon the merits, both of them erred in finding for the appellee in that there is absolutely no evidence to support the contention of the appellee on the merits; that is to say, there is no evidence whatever that the appellant Board ever did anything whatsoever in the premises other than what it was authorized to do by the Constitution and statutes of the state of South Dakota. And in addition to this being the state of the evidence, the highest court of the state, construing said Constitution and statutes of the state, has ruled in a way that is binding upon said federal courts that in truth and in fact appellants acted on full authority and in every way in compliance with the requirements of said Constitution and statutes of the state of South Dakota.

19. Because appellee was not entitled to any relief for the reason that it was given legal notice by the notice dated September 15, 1916 of the proposed formation of this new drainage project containing an enlarged benefited area with its property included therein, and that the same was about to be established and that appellee could at a hearing to be held on October 2, 1916, resist such new project, and appellee waived such hearing with full knowledge that it was bound by all subsequent action of the appellant Board which necessarily followed in the premises; and in addition thereto appellee stood by and without any objection on its part to said proceedings, saw the expenditure of over a quarter million dollars, for the payment of which appellee is charged with knowledge that the same must be made out of the property benefited, included in which class is appellee's, and in addition thereto, appellee actively aided and abetted said work as the same progressed and made no protest, and he is now estopped from questioning the legality of said proceedings.

Wherefore Appellants pray that the said findings, judgment and decree of the said Circuit Court of Appeals be reversed and that such further orders and proceedings be had as law and justice may require and that this case may be re-

manded and such relief given to appellants as may be their due.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Counsel for Appellants.

(Endorsed: Filed in U. S. Circuit Court of Appeals, May 31, 1924.

304 (Bond on Appeal to Supreme Court, U. S.)

Know all Men by These Presents:

That we, A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, as principals, and the Southern Surety Company, of Des Moines, Iowa, as surety, acknowledge ourselves to be jointly indebted to the Great Northern Railway Company, (a corporation) Appellee, in the above cause, in the sum of One Thousand Dollars (\$1,000.00);

Conditioned that, whereas, on the 18th day of March, A. D., 1924, in the Circuit Court of Appeals of the United States, for the Eighth Judicial Circuit, in a suit pending in that Court upon appeal, wherein the Great Northern Railway Company, a corporation, was plaintiff and appellee, and A. G. Risty, et al., as County Commissioners, etc., et al., were defendants and appellants, numbered on the Docket as No. 6317, a Decree was rendered against the said A. G. Risty, et al., as County Commissioners, etc., et al., appellants, and the said A. G. Risty, et al., as County Commissioners, etc., et al., having obtained an appeal to the Supreme Court of the United States, and filed a copy thereof in the office of the Clerk of this Court, to reverse the said Decree, and a citation directed to the said appellee, citing and admonishing it to be and appear at a session of the United States Supreme Court, to be held in the City of Washington, D. C.;

Now, if the said A. G. Risty, et al., as County Commissioners, etc., et al., shall prosecute their appeal to effect, and answ-

er all costs if they afil to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

A. G. RISTY,
Signing for all the Appellants,
Principals.

(Seal)

SOUTHERN SURETY
COMPANY
OF DES MOINES, IA.,
By H. B. Charnock,
Attorney-in-fact, Surety.

305 The foregoing bond is hereby approved. May 31, 1924.

WM. S. KENYON,
Judge of the United States Circuit
Court of Appeals, for the Eighth
Circuit.

* * * * *

(Certified copy of Power of Attorney issued to Mr. H. B. Charnock by the Southern Surety Company of Des Moines, Iowa., etc., attached to original bond.)

(Endorsed: Filed in U. S. Circuit Court of Appeals, May 31, 1924.

306

Citation

United States Circuit Court of Appeals
Eighth Circuit

A. G. Risty et al. as County Commissioners, et al., Appellants,
No. 6317. vs.

Great Northern Railway Company, Appellee.

United States of America

To Great Northern Railway Company, Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the Southern Division, District of South Dakota, wherein the Great Northern Railway Company is complainant and A. G. Risty et al. as County Commissioners, et al. are defendants, and in which case the said defendants perfected an appeal to the Circuit Court of Appeals, Eighth Circuit, an appeal has been allowed to the said A. G. Risty et al. to the United States Supreme Court. You are hereby cited and admonished to be and ap-

pear in said court at Washington, D. C. sixty days after the date of this citation to show cause if any there be, why the order and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable William S. Kenyon, Judge of the United States Circuit Court of Appeals, Eighth Circuit, this 31st day of May, A. D. 1924.

WM S. KENYON,
Judge of the United States Circuit
Court of Appeals, Eighth Circuit.

Service of the within Citation this 2nd day of June, A. D., 1924, at Sioux Falls, South Dakota, is hereby acknowledged.

HAROLD E. JUDGE,
Counsel for Appellee.

(Endorsed); U. S. Circuit Court of Appeals, Eighth Circuit, No. 6317. A. G. Risty, et al., as County Commissioners, et al., Appellants, vs. Great Northern Railway Company. Citation on Appeal to Supreme Court, U. S., and acknowledgment of service. Filed Jun. 5, 1924. E. E. Koch, Clerk.

307 (Praecipe for transcript on Appeal to Supreme Court, U. S.)

The Clerk of the above named Court is hereby directed to prepare and certify a transcript of record in the above entitled case for the use of the Supreme Court of the United States by including therein the following:

1. The printed transcript of record filed in your court.
2. Appropriate reference to the hearing held at St. Louis in the Circuit Court of Appeals.
3. The opinion of the Circuit Court of Appeals in this cause except the title thereof.
4. The decree of the Circuit Court of Appeals, except the title thereof.
5. Petition for appeal and order allowing the same, except the title thereof.
6. Assignments of error.
7. The bond on appeal and approval, except the title, and the powers of attorney, verification and authentication which may be shown by sufficient memoranda.

8. Citation in appeal and admission of service thereof.
9. Memoranda as to the praecipe filed.
10. Clerk's certificate.

Dated at Sioux Falls, South Dakota, this 3 day of June, 1924.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT.

Counsel for Appellants.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jun. 5, 1924.

308

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.
I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of South Dakota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, except the order of submission and opinion, had and filed in the United States Circuit Court of Appeals, omitting, however, the full captions, titles and endorsements in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the praecipe of counsel for appellants, in a certain cause in said Circuit Court of Appeals wherein A. G. Risty, et al., as County Commissioners, etc., et al., were Appellants and the Great Northern Railway Company was Appellee, No. 6317, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this tenth day of June, A. D. 1924.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 30,421. U. S. Circuit Court Appeals, 8th Circuit. Term No. 456. A. G. Risty et al., as county commissioners, et al., appellants, vs. Great Northern Railway Company. Filed June 16th, 1924. File No. 30,421.

(4406)

IN THE
SUPREME COURT
OF THE
UNITED STATES

A. G. RISTY, ET AL, AS COUNTY COMMISSIONERS,
ETC. ET AL,

Appellants, now Petitioners,

VS.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY
COMPANY, being No. 6312 on the docket of said
Circuit Court of Appeals of the Eighth Circuit,
Appellee, now Respondent.

Also the five other cases set forth on the cover page herof.

PETITION FOR WRITS OF CERTIORARI IN EACH OF
THE SAID SIX CASES.

TO THE HONORABLE CHIEF JUSTICE AND AS-
SOCIATE JUSTICES OF THE SUPREME COURT OF
THE UNITED STATES.

Your petitioners A. G. Risty, et al, as County Commis-
sioners, together with the County Auditor and County Treas-
urer of the County of Minnehaha, and State of South Dakota,
respectfully show to this Honorable Court:

(The parties styled appellants in the opinion of the Circuit Court of
Appeals will hereinafter be referred to as petitioners, and the parties styled
appellee in said opinion will hereinafter be referred to as respondent).

At the December term, in the year Nineteen Hundred Twenty-three, the above entitled causes were decided in the United States Circuit Court of Appeals for the Eighth Circuit. They had been by petitioners appealed to that Court from the District Court of the United States for the District of South Dakota. They were tried as one case in said District Court and also in the Circuit Court of Appeals. A single opinion covering all these cases was written in each of these courts.

The opinion in the Circuit Court of Appeals was by Kenyon, Circuit Judge, and Trieber and Dyer, District Judges.

The places in the transcripts wherein may be found the opinions respectively of the District Court for the District of South Dakota, and of the said Circuit Court of Appeals, the Bills filed, the Assignment of Errors presented to the Circuit Court of Appeals, the Decree and Judgment of each of the two said Federal Courts, and the Answers of the present petitioners, defendants and appellants below, may be found attached to this petition and as a part hereof, under the caption "Exhibit A", covering this and five other cases decided by the Circuit Court of Appeals for the Eighth Circuit in which one opinion was written, being numbered in that court 6312 to 6317, inclusive.

PRELIMINARY STATEMENT.

It may as well be stated here as anywhere that one of the principal reasons for applying for these writs is that the decision of the Circuit Court of Appeals is in conflict with the decisions by the highest Court of the State of South Dakota. That Court, construing the Constitution and Statutes of that State, has held that a certain ditch was lawfully established and that every step taken in establishing and in proceeding to obtain assessments, complied with the laws of that State. The Circuit Court of Appeals holds exactly the opposite. According to the highest Court in South Dakota, these respondents

are within the assessment area and must contribute to the cost of the ditch. The Circuit Court of Appeals holds exactly to the contrary. The decision of the highest Court of the State makes all persons benefited by the ditch liable to assessment. The Circuit Court of Appeals says that this is not true so far as these six respondents are concerned. There thus exists a situation which entitles us to the writs applied for, for self-evident reasons and under the holding of the *Forsyth* case, 166 U. S. at page 515.

Proceeding now to speak in a general way as to the situation, we beg to say that the petitioners, the Board of Commissioners of Minnehaha County in the State of South Dakota, did in the year 1916, acting on the authority of Section 6 of Article XXI of the Constitution of that State, and in accordance with sections numbered 8458 to 8491, inclusive, of the Revised Statutes of 1919 of that State, establish a drainage ditch in that County designated as "Drainage Ditch No. 1 and 2." Each of the respondents had property within the assessment area drained by this ditch. Drainage warrants in something over a quarter of a million of dollars were issued and used to pay for the construction of that ditch. Though the laws of said State permitted an appeal and a trial de novo and other review of all action on the part of petitioners, no appeal was taken and no review attempted. Once more complying with the laws of said State, the Board proceeded to make a tentative apportionment of benefits against persons and property affected, and in compliance with the laws of the State arrived at units to be used as a possible basis for ultimate assessment. Each of these units amounted to about \$9.50, and the total number of units was something over 32,000. By way of illustration, let it be said that out of this total some 1600 units were allotted to the respondent Milwaukee Railroad Company. The entire apportionment aforesaid was, as said, purely tentative. It fixed no amount of money that anyone should pay and placed no cloud upon the title of anyone to any property. When this tentative apportionment was finished, no one could tell what amount, if any, in dollars,

would finally be in controversy, with reference to those having property within said drainage area.

Complying again with the laws of said State, the Board then gave notice of time and place for a hearing at which these tentative apportionments would be equalized. At this hearing such tentative apportionment should and would be adjusted; the tentative apportionment made as to any party within said drainage area might be raised, lowered, or entirely cancelled. Not only that, but at this hearing additional territory might be included, or territory included, excluded, so that the said tentative unit of \$9.50 would no longer obtain and a different number of dollars would represent the units for the purpose of assessment value. After this notice for hearing had been given the respondents each filed a bill in equity in said Federal District Court of South Dakota. This Bill sought to enjoin the Board from assessing the complainants, now respondents, at all, or assessing any of their property. All of them, except the City of Sioux Falls, had diversity of citizenship. As to none of them ^{and} it ever appeared that when they filed said Bills there was in actual controversy a sum exceeding \$3,000.00 or any sum of money at all.

There is no showing anywhere which authorized a Court of equity to grant relief to complainants.

In a general way, all six of the respondents urged in their Bills that said action of the Board violated the Constitution of the United States and Amendments thereto; that said action was authorized neither by the Constitution of the State of South Dakota nor the statutes of said State, and that the Board was acting wholly without authority and was committing a naked trespass. The District Court held there had been no violation of Federal law. With certain reservations to be noted later, it found for the respondents, and enjoined petitioners from ever taking any step that might result in any contribution to the cost of said ditch on part of any of these respondents, or their property.

On appeal to the Circuit Court of Appeals, this action of said District Court was fully affirmed, except that the last named Court found it unnecessary to pass at all upon the alleged violation of the Federal Constitution, and affirmed with the holding that this should be done even though the Federal Constitution had not been violated. It is from this action of the Circuit Court of Appeals that this application for certiorari has resulted.

GENERAL REASONS RELIED ON FOR THE ALLOW- ANCE OF THE WRIT.

Petitioners ask the allowance of this writ because the Circuit Court of Appeals acted erroneously, speaking generally, in that it disregarded the following rules and propositions of law, and erroneously disregarded the following propositions of fact which are either conceded in the record or are proved without dispute, to-wit:

I.

The decision of the Circuit Court of Appeals has created a conflict between itself and the decisions of the highest Court of the State of South Dakota, to-wit, *Gilseth v. Risty* (S. D.) 193 N. W. 132; *Lumber Co. v. McMacken*, 31 S. D. 507 (141 N. W. 382); *In Re Sorenson Ditch*, 27 S. D. 342 (131 N. W. 300); *Davidson Co. v. Watertown Tile Co.* (S. D.) 196 N. W. 96. This conflict is in substance such a conflict as entitles petitioners to the writs of certiorari they are seeking, under the rule laid down by this Court in the case of *Forsyth*. 166 U. S. at page 515. The said South Dakota decisions, each and all are a construction by the highest Court of that State of the Constitution and Statutes of that State. The conflict goes beyond opposition to the *Gilseth* case, *supra*, which holds that the very project at bar, and the very actions of the petitioners (Board) that are complained of in the bills for injunction filed by the respondents, are valid under the laws of South Dakota. It is a conflict that will lead to the most

serious complications not only as to the ditch project at bar but to like complications in every drainage project attempted in South Dakota in the future, wherein the procedure will be the one that is sanctioned by the said decisions of the Supreme Court of South Dakota.

(a). According to the decision of the South Dakota Court the drainage ditch at bar was lawfully established, and the procedure adopted in this case will affect the lawful establishment of any drainage project proceeded with in the future.

(b). The South Dakota Court in effect defines the area for assessment purposes with reference to obtaining contribution to pay for the cost of such ditch.

(c). It rules that every act on ^{the} part of the Board (such acts as are described in the bills of complaint filed by respondents) was performed in accordance with the Constitution and Statutes of the State of South Dakota.

The Circuit Court of Appeals rules precisely to the contrary.

If this Court does not resolve this conflict, the ditch at bar and others like it established in the future, as the one at bar was, will be in lawful existence according to the South Dakota Court, and will not have such existence according to the Circuit Court of Appeals. Under the ruling of the South Dakota Court all within the assessment area must contribute; under the decision of the Circuit Court of Appeals only part of them need contribute. Indeed, if the decision of the Circuit Court of Appeals is not annulled there is nothing to prevent other resident taxpayers from obtaining a federal injunction restraining the collection of the assessment from them although the highest Court of the State has held that they are subject to such assessment. For that matter, in the case at bar, the Federal Court has relieved the City of Sioux Falls, a resident, from contribution, despite said decisions of the Supreme Court of the State of South Dakota.

But we respectfully submit that this is not the time for full argument as to which line of decisions is right. This is but an application to be heard in this Court. It is after this application shall be granted that the choice between the two lines must be made. In other words, it is on the hearing after the writ is granted that it will be for you to say whether the Circuit Court of Appeals should be affirmed or reversed.

See point I, page I of the Brief.

II.

As distinguished from creating the general conflict dealt with in the preceding point the Circuit Court of Appeals erred in its decision in these six cases. Its decision should have been in favor of the petitioners and would have been in their favor had the Circuit Court of Appeals followed the construction of South Dakota law as construed by the highest Court of that State, in the Gilseth case, 193 N. W. 132, and other decisions set forth in Point 1. It erred in deciding as it did because it erred in doing its own construing of said state law and basing its affirmance on a construction on its own part which is in conflict with that of said construction of said state law on the part of the highest Court of the State.

See point V, page 11 of the Brief.

III.

The controversy at bar is a proceeding *in rem*. As to such an one, both residents and non-residents of South Dakota must (at least in the first instance), resort to the State tribunals provided for reviewing such controversies, before they may enter the Federal Court at all. (*Weld Co. case*, U. S., 44 Sup. Ct. Rep. 385).

See point III, Page 5 Brief.

IV.

As to every taxation project the proceeding is one *in rem*

as to any property within the state, even though owned by a non-resident. Dealing with such project or any review of the same involves property rules; and as to such rules the Courts of the State are the final and only authority.

See point II, page 4, and point III, page 5 Brief.

V.

It was error to grant injunctive relief because what was in effect done was to restrain legislative action on ^{the} part of the petitioner Board, acting in a legislative capacity under delegation from the legislature of the State. The legislature itself could have, by statute, done everything the Board did and was proposing to do, and it should be conceded that the legislature could not have been enjoined from enacting such a statute. The only difference is that the Board was bound to give certain notices and hearing before any assessment could become a lien, and the Board did what it was bound to do.

See point IV C, page 11, Brief.

VI.

There being no controversy over an amount exceeding Three Thousand Dollars there was no right to enter the Federal Court by either resident or non-resident, even though it be assumed that a substantial federal question was being presented. That is to say, so far as a controversy, such as the one at bar, is concerned, no one may enter the Federal Courts unless the controversy involves more than Three Thousand Dollars. (*Holt vs. Ind. Mfg. Co.*, 176 U. S. 68).

See point II, page 4, Brief.

VII.

The respondent City of Sioux Falls should not have had its suit entertained in the Federal Courts because it is not a non-resident of the State of South Dakota and could and did enter the Federal Court only, assuming it could enter it at all, upon the assertion of alleged federal constitutional questions.

And it had no right to have those entertained because under the rule of the case of *Weld County*, 44 Sup. Ct. Rep. page 385, it had no right to enter the federal Court at all without first resorting to such tribunals as the law of South Dakota had provided for the review of a controversy like the one at bar; and said respondent has never resorted to those tribunals.

See Point II, page 4, Brief.

VIII.

What is said in Point 3 and Point 7 hereof is as true of the five non-resident respondents. While to be sure, they had diversity of citizenship they did not have a suit involving an actual controversy over a sum exceeding Three Thousand Dollars (See Brief point III, at page 5). Therefore, they stood in the same position as to the necessity of resorting to the State tribunals, (at least in the first instance), as does the respondent City of Sioux Falls.

IX.

It erred in granting the relief to either and all of the six respondents because there was no substantial federal question involved, for the trial Court held that the Constitutional questions so called that were raised were untenable, and because in truth the pretended constitutional questions were purely colorable and made for the purpose of imposing on the jurisdiction of the Federal Court by asserting pretended Constitutional questions.

See point III, page 5, Brief.

X.

While it is true a Federal question may give the Federal Courts jurisdiction, even though it does not consider that question in its decision, that rule is not applicable here. Here, the Federal Court was entered on the ground of diversity of citizenship with a controversy not shown to exceed Three

Thousand Dollars, and with Federal questions which the Court held untenable or not necessary to be considered in deciding. All the grounds upon which the Federal jurisdiction had been invoked proving untenable the Court erred in passing upon the so-called merits of the dispute. Where there is no substantial Federal question nor the requisite amount in controversy the dispute is one for settlement in some tribunal other than the Federal Court.

See point III, page 5, Brief.

XI.

It is true that where a citizen of a state may enter the Courts of that state, one who has diversity and a controversy involving more than Three Thousand Dollars need not submit himself to those state Courts but may at his election enter the Federal Courts. But where, say, in a proceeding *in rem*, like a drainage project, the citizen of the state must submit to administrative review and may not enter the Courts of his own State, the non-resident may not have such proceeding *in rem* reviewed in the Federal Courts. He can enter that Court only where the citizen of the state can enter the State Court.

See point III, page 5, Brief.

XII.

If, as is contended by the Circuit Court of Appeals, the petitioners acted utterly without authority of law and were, therefore, mere trespassers, that fact gave respondents an adequate remedy at law in either the Federal or State Court at their election, to-wit, to sue in trespass, — and hence, their bills in chancery should not have been entertained.

If, on the other hand, the acts of the petitioners were in all respects lawful, the respondents were not entitled to any remedy either at law or in equity.

See point IV, page 8, Brief.

XIII.

The Federal Court enjoined having a hearing which was to be had for the purpose of equalizing a tentative apportionment theretofore made. In addition to the reasons set forth in point 12, it was error to enjoin because in any view respondents were not entitled to invoke chancery jurisdiction. The naked fact that such a hearing was to be had did not invoke any of the heads of that jurisdiction. Manifestly, the holding of such hearing could not give rise to a multiplicity of suits as against each of these respondents, no matter how many suits might arise as to other parties. Manifestly, the proposal to hold such hearings cast no cloud on title nor could its being held create any irremediable injury.

This is especially applicable to the respondent City of Sioux Falls, and the respondents four Railway Companies, because even if an assessment had been made and a tax levied, it would have created no lien upon the property of those respondents.

See point IV, page 8, Brief.

XIV.

These suits by bills of injunction were at all events premature. The injunctions were sought at a time when all that was impending was a hearing to determine what proportionate amount, if any, should be contributed by each of the respondents; and it could not then be known whether any contribution would be imposed upon them at such hearing. Assuming there was ever the right to enter the Federal Courts, the respondents should have waited till after such hearing had been had and an assessment had been determined upon; and there was absolutely no warrant to entertain their bills to enjoin such hearing.

See point IV, page 8, Brief.

XV.

It was error to hold that an injunction was warranted

before said hearing to equalize apportionments was had, on the reasoning that one should not be compelled to appear at that hearing because it would be had before said Board and that said Board had no authority whatever to act — that no one should be compelled to submit to a hearing before a mere trespasser. This disregards, first, that the mere assertion that the Board was without authority did not justify the failure to appear at said hearing, and, second, it disregards the said decisions in the said South Dakota cases, that the commissioners were acting on full authority; and third, it appears by the undisputed testimony that they had full authority.

See point IV, page 8, Brief.

XVI.

Assuming respondents could enter the Federal Courts at all, they and each of them had at all times a plain, adequate and complete remedy at law in the premises, and in said Courts, by appealing from the establishment of the ditch to the Circuit Court of the State of South Dakota and thence removing the entire controversy involved, including the making of assessments, to the law side of the Federal Court, where a trial de novo could be had. Instead, they lodged Bills of Complaint seeking injunctions. And while it may be true respondents have waived the right to this appeal from the establishment of the ditch, that does not alter the fact that they had no right to enter a Court of equity, on the ground that though they had at one time the right to thus appeal to and have review in the Federal Court by a trial de novo there on the law side, they had voluntarily lost that right. The right to enter chancery cannot be created by waiving or failing to exercise an adequate remedy at law.

Passing that, they had the right to appeal from the action of petitioners, as to the equalization of apportionments of benefit, directly to the said Circuit Court of the State, and thereupon

to remove this very controversy for review on the law side of the Federal District Court, and there have a trial de novo.

See point IV, page 8, Brief.

XVII.

The Circuit Court of Appeals erred in giving the relief it gave the petitioners on the reasoning that the latter had no authority to make an assessment except in aid of a drainage project to drain agricultural lands. This is erroneous because it is and for a long time has been the settled law of the State of South Dakota as declared by the highest Court of that state, in construing its constitution and statutes, that the right of a Board, such as petitioner is, to establish a drainage ditch is not confined to the drainage of agricultural lands, but exists as to such a drainage ditch as the very one at bar is. And it is undisputed in the evidence that one object of the project was to drain agricultural lands.

See point V, page 11, Brief.

XVIII.

It is not only the fact that the highest Court of the State of South Dakota has ruled in construing the laws of South Dakota that the drainage project at bar was lawfully established and that the acts of the petitioners were lawful, but the record shows both facts without dispute. And the Circuit Court of Appeals affirmed despite such ruling and despite said state of the evidence.

XIX.

Assuming for the sake of the argument, that the District Court and the Circuit Court of Appeals had authority to pass upon the merits, both of them erred in finding for the respondents, because there is absolutely no evidence to support the contention of the respondents on the merits. That is to say, there is no evidence whatever that the petitioner Board ever did anything whatsoever in the premises other than what they were authorized to do by the Constitution

and the Statutes of the State of South Dakota. And in addition to this being the state of the evidence, the highest Court of the State construing the Constitution and laws of the State has ruled in a way that is binding upon said Federal Courts that in truth and in fact, the petitioners acted on full authority and in every way in compliance with the requirements of said Constitution and statutes of the State of South Dakota.

See point V, page 11, Brief.

XX.

The Circuit Court of Appeals based its action on the holding that the Board had acted without authority from and had not complied with the provisions of the statutes of South Dakota regulating the maintenance and repair of ditches already established. Some of the respondents conceded that the project at bar was the creation of a new ditch. That fact is established by the undisputed evidence as against all the respondents. It is undisputed in the evidence that there was full compliance with every statute dealing with the establishment of a new ditch. Therefore, the Circuit Court of Appeals affirmed because there had been a failure to comply with statutes that had nothing whatever to do with the establishment of a new ditch or assessing for the cost of its construction. It disregarded that the relevant statutes had been complied with, and based its action wholly on the fact that statutes that had no application had not been complied with.

See point V, page 11, Brief.

XXI.

The Federal Courts should have given no relief to the City of Sioux Falls because it was one of the signers of the petition that initiated the establishment of the ditch and the subsequent action of the petitioners. It was, therefore, estopped to object to being assessed to contribute its portion to

wards the cost of the construction; also estopped by reason of the premises to challenge the said ditch project on the ground of unconstitutionality; or to assert that the laws of the State of South Dakota had not been complied with either in the construction of said ditch or in proceeding to make an apportionment to obtain contribution to pay for its costs—for the City asked all to be done that was done.

See point V, page 11, Brief.

XXII.

The Federal District Court reserved from its decree such property as the respondents, Chicago, Milwaukee and St. Paul Railway Co. and Chicago, St. Paul, Minneapolis and Omaha Railway Co. had within the assessment area of the old ditches. But it failed to make the like reservation as to property which the City of Sioux Falls had in the same area; and the Circuit Court of Appeals erred in affirming without modification curing this omission as to the City of Sioux Falls.

Your petitioners are advised that said Judgments of the Circuit Court of Appeals are final, and are erroneous, and that this Honorable Court should require each of the six cases to be certified to it, by a writ in each of said cases, for its review and determination under the act of Congress permitting causes made final in the Circuit Court of Appeals to be certified for revision.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued under the seal of the Court, in each of the said six cases, directed to the United States Circuit Court of Appeals, for the Eighth Circuit, commanding that Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record, and all proceedings of the Circuit Court of Appeals had in the said causes, to the end that these causes may be reviewed and determined by this Honorable Court as provided by

the act of Congress, approved March 3, 1891, establishing the Circuit Court of Appeals, and defining and regulating its jurisdiction; and that the said judgments of the said Circuit Court of Appeals in each of the said causes be reversed by this Honorable Court, and that they have such further relief as may seem proper.

And your petitioners will ever pray.

BENJ. I. SALINGER,
Carroll, Iowa,

E. O. JONES, and
N. B. BARTLETT,
Sioux Falls, South Dakota,
Counsel for Petitioners.

CERTIFICATE.

The undersigned, Benjamin I. Salinger, states that he is of counsel for the petitioners herein, that he knows of the above proceedings had and that the facts therein and herein stated are true to the best of his knowledge and belief.

Benj I Salinger
Counsel for Petitioners.

"EXHIBIT A".

The opinion of said Circuit Court of Appeals, which covers all of said cases will be found on Page 247 of the Transcript of Record, sent to this Court in what was the case of Risty v. Chicago, Rock Island and Pacific Railway Company, No. 6312, in the Circuit Court of Appeals.

The opinion of said District Court which also deals with all of said cases, on Pages 81 to 101 of said Transcript.

(MILWAUKEE) The Bill filed in the District Court by the Chicago, Milwaukee and St. Paul Railway Company, on pages 3 to 20 of said Transcript.

The Answer filed in the District Court in said case on Pages 21 to 72 of said Transcript.

The Assignment of Errors on the appeal and in the case of the Milwaukee, on Pages 98 to 108 of said Transcript.

The Decree and Judgment of the District Court in the Milwaukee case, on Pages 94 to 98 of said Transcript.

The Judgment and Decree of the Circuit Court of Appeals therein on Page 258 of said Transcript.

(ROCK ISLAND) As to the case of the Chicago, Rock Island and Pacific Railway Company, No. 6312, the Bill in that case will be found on Pages 3 to 21 of the Transcript sent to this Court in that case.

The Answer filed in the District Court in said case on Pages 22 to 64 of said Transcript.

The Judgment and Decree of the District Court, on Pages 101 to 104 of said Transcript.

The Assignment of Errors on appeal therein to the Circuit Court of Appeals, on Pages 104 to 114 of said Transcript.

The Judgment and Decree of the Circuit Court of Appeals therein on Page 265 of said Transcript.

(OMAHA) As to the case of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, No. 6314, the Bill in that case will be found on Pages 3 to 20 of the Transcript sent to this Court in that case.

The Answer filed in the District Court in said case on Pages 22 to 65 of said Transcript.

The Judgment and Decree of the District Court, on Pages 88 to 91 of said Transcript.

The Assignment of Errors therein on appeal to the Circuit Court of Appeals, on Pages 91 to 102 of said Transcript.

The Judgment and Decree of the Circuit Court of Appeals therein, on Page 266 of said Transcript.

(POWER CO.) As to the case of the Northern States Power Company, No. 6315, the Bill in that case will be found on pages 3 to 21 of the Transcript sent to this Court in that case.

The Answer filed in the District Court in said case on Pages 22 to 65 of the Transcript.

The Judgment and Decree of the District Court, on Pages 100 to 103 of said Transcript.

The Assignment of Errors therein on appeal to the Circuit Court of Appeals, on Pages 103 to 114 of said Transcript.

The Judgment and Decree of the Circuit Court of Appeals therein, on Page of said Transcript.

(CITY) As to the case of the City of Sioux Falls, No. 6316, the Bill in that case will be found on Pages 3 to 18 of the Transcript sent to this Court in that case.

The Answer filed in the District Court in said case on Pages 19 to 63 of said Transcript.

The Judgment and Decree of the District Court, on Pages 86 to 88 of said Transcript.

The Assignment of Errors on appeal therein to the Circuit Court of Appeals, on Pages 88 to 100 of said Transcript.

The Judgment and Decree of the Circuit Court of Appeals therein, on Pages of said Transcript.

(GREAT NORTHERN) As to the case of the Great Northern Railway Company, No. 6317, the Bill in that case will be found on Pages 3 to 20 of the Transcript sent to this Court in that case.

The Answer filed in the District Court in said case on Pages 21 to 64 of said Transcript.

The Judgment and Decree of the District Court, on Pages 99 to 101 of said Transcript.

The Assignment of Errors on appeal thereon to the Circuit Court of Appeals, on Pages 101 to 112 of said Transcript.

The judgment and decree of the Circuit Court of Appeals therein on page of said Transcript.

The Bill for the respondents was filed in the District Court on the 29th of July, 1921.

The Decree in said Court was entered therein on the 2nd day of March, 1922.

Appeal from this action of the District Court was allowed August 25, 1922.

The Circuit Court of Appeals affirmed and entered decree and judgment for the respondents on the 18th day of March, 1924.

IN THE
SUPREME COURT
OF THE
UNITED STATES

A. G. RISTY, ET AL., as County Commissioners,
Etc., et al.,

Appellants, now Petitioners,
Against

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY
COMPANY,

Appellee, now Respondent.

Being No. 6312 on the Docket of the United States Circuit
Court of Appeals for the Eighth Circuit.

Also five other cases decided by said Circuit Court of Appeals
set forth in the caption to the Petition for Writs
of Certiorari filed in this Court.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

*There is such conflict between the Highest Court of the
State of South Dakota and the Circuit Court of Appeals as en-
titles petitioners to the Writ of Certiorari they are seeking,
under the rule of the case of Forsyth, 166 U. S. 515.*

At this point it is perhaps unnecessary to discuss which of
said lines of decision is right. Our main insistence is that both

cannot stand, and that the decision of the Circuit Court of Appeals will stand unless this Court annuls it on *certiorari*.

The petitioners have contended throughout that they have established a new ditch, designated "Drainage Ditch No. 1 and 2," and that they have taken certain steps for bringing about contribution from those benefited, to the cost of this ditch. In the cases of *Gilseth vs. Risty*, (S. D.) 193 N. W., 132; *Lumber Co. vs. McMacken*, 31 S. D., 507, (141 N. W., 382); *In re Sorenson Ditch*, 27 S. D., 342, (131 N. W., 300); *Davidson County vs. Watertown Tile Co.*, (S. D. 196 N. W., 96, the highest Court of the State of South Dakota is construing the Constitution and Statutes of the State, and is holding that all acts on the part of the petitioners were in compliance with, and therefore, authorized by such Constitution and laws. The Circuit Court of Appeals holds exactly to the contrary; holds, in effect, that this Ditch does not exist, and that all attempts looking towards assessment for its cost were naked trespasses. This creates a situation which was in substance one that induced this Court to allow *certiorari* in the case of *Forsyth*, 166 U. S., 515. The bald statements so far made are fairly self-proving, and scarcely seem to require elaboration. If the decision of the Circuit Court of Appeals is not annulled, this ditch does not exist, though the Supreme Court of the State holds and will continue to hold that it does. If both lines of decision stand, some holders of property benefited within the drainage assessment area must contribute, while others need not. The latter differentiation is not even founded upon the existence of diversity of citizenship, for in this very case the Federal Court has enjoined obtaining contribution from the respondent, City of Sioux Falls, which is not a non-resident. This situation as to the ditch project at bar, is, in all good conscience, serious enough, but what is done to this particular project is as nothing to what this conflict will do to all drainage projects undertaken in South Dakota in the future. If in such future projects, the procedure is that which is authorized by the decisions of the highest court of the State, yet, though such project be carried on in compliance with the

laws of the State as declared by the highest court of the State, it will be invalid under the decision of the Circuit Court of Appeals in this case. In short, unless this Court annuls the decision of the Circuit Court of Appeals, drainage ditches cannot be established in South Dakota merely by observing the procedure demanded by the constitution and laws of the State. To establish them, the proceedings will have to comply with rules laid down by two courts that are opposed to each other as to what is required. One will be compelled at the same moment to chase two horses running away in opposite directions.

We have said that this point demands the writs without argument as to which Court is right. Perhaps this is the proper place to say a word on this head. Perhaps if it were clear to this Court that the Circuit Court of Appeals was right, that might influence this Court on the question of granting the writs. The Circuit Court of Appeals, however, is clearly the one that is in the wrong. In every aspect the proceedings at bar are *in rem*. In every aspect the construction given the constitution and statutes of the State by the highest court of the State are binding on the Federal tribunals. In every aspect it is South Dakota law that must settle what is required to establish a drainage project in South Dakota, and what that law is is what the highest Court of that State construes it to be. The essence of the matter then, is that the highest Court of South Dakota has declared what must be done under the constitution and laws of the State to validate what these petitioners have done, and that the requirements of the law have been observed. Not only has the Circuit Court of Appeals created an inolerable conflict, but it has opposed itself to decisions of a State Court, which decisions are binding upon the Circuit Court of Appeals. Manifestly, both lines of decision cannot be right. Manifestly, both lines should not remain in existence. Manifestly, only this Court can eliminate one of them. It is for a final hearing to determine which of the two is right; in other words, to determine whether the Circuit Court of Appeals should be reversed or affirmed. That question should not be stressed at this

point, because now we are but asking permission to make a full argument as to which line of decisions should rule.

II.

The injunctions obtained by Respondents have made it impossible to ascertain what amount is or ever will be in controversy. This puts resident and non-resident respondents on the same footing, and on the authority of the case of Weld County, 44 Sup. Ct. Rep., 385, the Federal Courts had no power to decide at all, because the Respondents failed to resort to the tribunals provided by the laws of the State of South Dakota for Dealing with such a controversy as the one at bar.

A naked conclusion that the requisite amount is in controversy, accomplishes nothing. The bill must state facts showing that such an amount is in controversy, and the bills at bar have no fact allegation on this point, and have nothing but that conclusion. If the bills had been in proper form, the respondents still had to prove the allegation. *First National Bank vs. Highway Commission*, U. S., 68 L. Ed. Adv. Opinions, 380. They have utterly failed to do so. The reason for our saying this is this: In beginning the steps necessary to obtain the funds to pay for the construction of the ditch, the Board made a purely tentative estimate of the apportionment which each of these respondents might ultimately be called upon to pay. The law of South Dakota provides that this is purely tentative, and provides for a hearing, upon notice, to equalize this tentative apportionment. On such hearing, new territory may be added, territory already in may be excluded, and any tentative apportionment may be lowered or raised, or may even be cancelled. It follows that until this hearing was had there could not even be as much as a final estimate of how much any particular person or tract affected should pay. No matter what the tentative apportionment was, it could result from the hearing that any particular property owner might have no more than Ten Dollars apportioned to him. The injunctions at bar stopped this hearing. Consequently, it is

manifest that at the time when the injunctions were applied for, it could not be known that more than Three Thousand Dollars was in controversy as to any one. Of course, the hearing has never been had, so the respondents got their injunction without any evidence that the requisite amount was in controversy.

Nor is that all. Even that hearing could not establish an amount in controversy. No assessment could be made, and no lien could be created towards that end. The hearing was, under the law, one step to that end; still further steps were required. Having stopped the first step which could definitely create an estimate even, as to the amount in controversy, respondents have failed to show the requisite amount.

III.

As to a proceeding in rem such as the ditch project at bar is, and as to a proceeding in rem involving a controversy over taxation, the rules for dealing with lands within the State for taxation purposes are the same, whether the owner of the lands be a resident, or a non-resident, and the Respondents had no right to enter the Federal Courts because they did not go into the tribunals provided by the State.

As to proceedings *in rem* affecting lands within the State, one cannot obtain treatment differing from that accorded the resident by retaining his ownership of the land and maintaining citizenship in some other State. If this be not so, the State law will not control as to rules of property.

We have frequently assumed, for the sake of the argument, that these respondents had the right to enter the Federal Court, and have contended, even if that be assumed, that it was error to grant the relief they obtained, or any relief. In a way, we have assumed, for the sake of argument, that there might be a difference between a resident and non-resident owner of lands, in dealing with a taxation project concerning lands within the State. We now drop these arguments and

concessions, and submit that neither resident nor non-resident, in this case, had the right to enter the Federal Courts, and that if it be assumed they had, they lost that right by failing to prove conditions precedent, that are binding alike upon resident and non-resident.

To begin with, there is no constitutional requirement that anyone may have a drainage or taxation controversy reviewed in judicial tribunals. While it is true that in some cases a non-resident may have judicial review in the Federal Court, though the resident cannot have it, no non-resident can enter the Federal Court, especially in a proceeding *in rem*, if the resident of the State may not take the controversy into the Courts of the State. In fewer words, if, under the law of South Dakota, its citizens must settle such a controversy as the one at bar, by going into administrative tribunals provided by the law of the State, the same is true of the non-resident. The law that keeps the citizen out of the State Court, keeps the non-resident out of the Federal Court. In this case there was no substantial Federal question presented. So far as the two Courts have spoken, they held what we have just stated. But if there was such question, it was the duty of the parties to the controversy to submit to the administrative tribunals provided by the State, before entering the State or Federal Courts on any ground. *Bank of Greeley vs. Com. of Weld County*, U. S.,, 44 Sup. Ct. Rep., 385. *Sioux Falls Bank vs. Minnehaha County*, 29 S. D., 146, (135 N. W., 689); *Bagley Elevator Co. vs. Butler*, 24 S. D., 429, (123 N. W., 866); *Curtis vs. Pound*, 34 S. D., 633, (150 N. W., 287). We need not discuss what the law would be if the provisions creating these administrative tribunals were in some way violative of the Federal law. The record presents no such situation. We need not discuss whether, if the administrative tribunals were exhausted, there might not be judicial review in the State Courts, and ultimate reaching of the Federal Court by writ of error to the highest Court of the State. The concrete situation is that this Court has settled, in the Weld County case, *supra*, that a citizen of South Dakota had no right to enter

these Federal Courts, of whose action we are complaining, because he had not gone into said administrative tribunals. We have already pointed out that whatever keeps the citizen out of the State Court, should bar the non-resident from entering the Federal Court, and that this would be true even if there had been presented (and there was not) a substantial Federal question.

In a word — a proceeding *in rem* gives less preference to non-residents than a suit *in personam*. It will be conceded that if no judicial review were provided for the citizen of South Dakota to collect a promissory note for One Thousand Dollars, he could not enter the Federal Courts on the ground that State Courts procedure had not provided him a method for such collection. It should be conceded that if a non-resident of South Dakota had nothing but a claim for One Thousand Dollars in money, and he could not enter the State Courts of South Dakota to obtain collection, of course he could not enter the Federal Courts for the like purpose. If all else ruled against us, it is certainly true that if, under the Weld County case, *supra*, the City of Sioux Falls could not enter the Federal Court because it had not first entered the State Tribunal, the same is true of these non-resident respondents, if the amount in controversy did not exceed Three Thousand Dollars; and it did not. On no theory has there ever been a differentiation as to remedy between the resident and the non-resident, except where the latter had the required amount in controversy. On what reasoning can the City of Sioux Falls be ruled out of the Federal Court, and the non-resident allowed to enter it, when the amount in controversy does not exceed Three Thousand Dollars? On a thousand dollar claim, the non-resident has just what the resident has. We repeat that in *in rem* controversies there is even less differentiation between the resident and the non-resident.

We also assert that neither resident nor non-resident can, under any circumstances, enter the Federal Courts directly

and in the first instance, where the amount in controversy does not exceed Three Thousand Dollars. *Holt vs. Ind. Mfg. Co.*, 176 U. S., 72.

True, there are cases where the presentation of a substantial Federal question obtains review of the whole controversy, even though the Court does not find it necessary to consider the Federal question. The case at bar is not governed by that rule. Here, we have nothing but an assertion that there is a substantial Federal question, and an assertion that more than Three Thousand Dollars is in controversy. If it be demonstrated, as it has been in this case, that neither assertion is proved, the Federal jurisdiction has not in fact been invoked. If that be not so, every one can have any controversy considered in the Federal Courts by merely asserting by way of a naked conclusion that he has a substantial Federal question, and that more than Three Thousand Dollars is in controversy.

The bill of each respondent should have been dismissed because the amount in controversy is too small, and because it had not first gone into the proper State tribunal.

IV.

The Federal Court should not have entertained the bills of Respondents, because the controversy presents no element of the chancery jurisdiction: If the Respondents had the right to enter the Federal Court at all, they had an adequate remedy on the law side of the Federal Court, and at all events, suit in equity was prematurely brought.

A.

When all is said, there was an injunction to restrain the steps that might by possibility create an illegal tax. It is hornbook law that equity will not afford relief against such tax.

Here is what had happened: The petitioners had estab-

lished a new drainage ditch. Appeal from this could have been taken, but was not taken. The petitioners then proceeded according to law, to take the steps wherewith to obtain the funds to pay for the construction of the ditch established. A point was reached when all persons interested were notified that a hearing would be had to make a final estimate as to what sum, if any, persons within the assessment area of the new ditch, should contribute towards paying for its construction. Before this hearing could be had, the injunctions at bar were applied for. Even at this point, if there had been the creation of any tax, legal or illegal, (which, of course, is not so) equity had no jurisdiction. Assuming that an illegal tax is in some way to be considered as existing, what elements of chancery jurisdiction existed? Such hearing threatened no one with multiplicity of suits; at any rate, if it did, it would be a multiplicity consisting of many suits against many different persons, but not many involving either of these respondents. They cannot complain that others might have been subjected to suits, or compelled to bring them. The proposed hearing which the injunction stopped, could manifestly work no injury, to say nothing of an irreparable injury. The hearing could not result in a lien. It could, at the most, but determine on what basis, as to amount, a lien might later be established. It is, therefore, manifest that equity obtained no hold on the ground that a cloud would be cast on the title of any one. The hearing that was stopped surely could not place a cloud on anything. What is more, as to the respondents the four Railroad Companies, and the Respondent the City of Sioux Falls, no lien could in any event be placed against their property. The tax against these respondents could be no more than a personal charge to be collected on execution, and in the case of the City, by a proceeding in the nature of a mandamus.

The Circuit Court of Appeals holds, in effect, that all the Board attempted to do, and the acts which the injunction stopped, were wholly without authority; that the Board was a mere trespasser. Finding that, should have moved it to hold that equity had no jurisdiction, for there was an adequate

remedy at law on the law side of the Federal Court, to-wit: an action in trespass. And of course, the presence of this adequate remedy forbids that equitable relief should be given. It may be added that if the Circuit Court of Appeals is in error, and the Board was not a trespasser, and acted lawfully, still equity should have given no relief, because in the last case there would be no right to relief either in law or in equity.

B.

It is not overlooked by us that if appeal and removal were adequate remedies in the Federal Court, the right to such appeal has been lost by respondents, so far as the establishment of the ditch is concerned. But we respectfully submit that equity does not obtain jurisdiction because one has voluntarily lost an adequate remedy at law. What is more, if it be assumed that the respondents have the right to enter the Federal Court at all, they can still appeal to the Circuit Court of the State, and remove the entire controversy to the Federal Court, and secure a trial *de novo*, if the Board is permitted to proceed with this hearing and to take the further steps, by way of assessment, that the laws of South Dakota require to be taken.

Neither do we overlook the rather remarkable argument found in the opinion of the Circuit Court of Appeals, to the effect that since the Board was acting as a mere trespasser, equity could enjoin the hearing to make apportionment of benefits, because that hearing was before the Board, and one should not be compelled to submit himself to the action of a mere trespasser. The difficulty with this is that the mere fact that a pleader says the Board was acting without authority, does not give the right to relief in chancery. Here is a case where, despite that pleading, and despite this argument and assertion of the Circuit Court of Appeals, it appears without dispute that the Board was acting on full authority, to say nothing of the fact that, in addition to the proof, it is the

holding of the highest Court of the State that they acted on full authority, *Gilseth vs. Risty, supra*. The argument of the Circuit Court of Appeals fails for want of sound premise, and no valid reason is perceived why said hearing should have been stopped by the injunction.

In any view, it is well settled that the suits are premature. *Western Union Tel. Co. vs. Howe*, 180 Fed., 44; *Milheim vs. Moffit Tunnel*, 262 U. S., 710; *Keokuk & H. Bridge Co. vs. Salm*, 258 U. S., 122. It is true that the Circuit Court of Appeals seeks to avoid and distinguish some of these cases just cited, but it does so by assuming, without warrant, that the Board was acting without authority. It may be true that in the cases we have just cited, it was not asserted that all authority was lacking. But that is a distinction without a difference because it appears here without dispute that authority was not lacking.

C.

Equity had no jurisdiction because, in effect, the injunction restrained legislative action. What the Board was doing was exercising legislative authority delegated to it. The legislature could, by statute, have established this ditch and fixed what each person affected should contribute. It should not be claimed that an injunction could have stopped the legislature from passing such a statute. The only difference is that such statute could have been passed without notice or hearing, while the Board acting under legislative delegation, was bound to give notice and opportunity to be heard — and it did so.

V.

The Circuit Court of Appeals erred in giving the relief Respondents obtained, because it could give such relief only by disregarding the construction of State law by the highest

Court of South Dakota, and by disregarding the undisputed testimony as well.

The essence of the dispute is whether the Board had complied with the appropriate laws of the State. As seen, the highest Court of the State held that there had been such compliance. The respondents had the burden of proving non-compliance. They utterly failed to discharge that burden. What is more, though petitioners did not have the burden, they established affirmatively that there had been full compliance on their part with the laws of the State, as interpreted by the highest Court of the State.

By way of amplifying the statement that the Court disregarded the interpretation of the highest Court of the State, and that it found against sound reasoning, and against the evidence, we beg to submit the following propositions:

The Circuit Court of Appeals declares that the project at bar was not authorized by law, because the law allows ditch projects only for the purpose of draining agricultural lands. The highest Court of South Dakota has held that drainage of such lands is only one of the purposes for which a ditch may be established, and held that the ditch at bar was authorized by South Dakota law. In addition to disregarding this interpretation of the said State Court, the Circuit Court of Appeals overlooked the undisputed evidence that the project at bar does involve the drainage of agricultural lands.

The vital basis of the opinion is the assertion that the project is invalid because whatever was pretended about it, it was in truth an attempt to make people, not chargeable therewith, contribute to the maintenance and repair of old ditches. In other words, the opinion rests on the fact that statutes dealing with the repair and maintenance of old ditches were not complied with. Three of the respondents conceded in their briefs that this premise was unsound; conceded that the ditch at bar was a new ditch, and that no subter-

fuge was being resorted to to burden people not chargeable with the maintenance and repair of an old ditch. What these three conceded is established as to all, without dispute. The opinion of the Circuit Court of Appeals notes these concessions, and then forgets them and fails to give what those concessions demand. It comes to this, then: The Circuit Court of Appeals has affirmed on the ground that irrelevant statutes were not followed, which involves overlooking the said concession and evidence, and, therefore, overlooking what were the relevant statutes. In still other words, it is demonstrated that the only statutes the Board needed to follow were those that regulated the establishment of a new ditch. It is undisputed that they followed those. It is, of course, true that there are hundreds of statutes that they did not follow. So the Circuit Court of Appeals has held as it has, that even though the relevant statute requirements were met, the project was invalid because irrelevant ones had not been followed.

The opinion does note the existence of the Gilseth case, but it does not so much as mention its holding, so far as the main question in dispute are concerned.

The Court overlooked the fact that the City of Sioux Falls was estopped from any relief. The City signed the petition which initiated the project, and it asked everything to be done that the Board had done, or was proposing to do. It went so far as to allege in its bill that this very project would prevent the City from losing its water supply. Surely, on proper consideration, it would have been held that this one respondent should not have the relief which it got. *DeNoma. vs. Murphy*, 28 S. D., 372; *Sheppard vs. Barron*, 194 U. S., 553.

Two of the respondent Railways had property in the assessment area of certain old ditches, and they also had property in the territory added by establishing the new ditch. As to the said Railroads, the trial court reserved from the injunction the right to assess as to their said property within the area

of the old ditches. Though the City of Sioux Falls was in precisely the same situation as these two Railways, no such reservation was made in the decree in its favor. And the Circuit Court of Appeals affirmed, without modifying to correct this manifestly arbitrary differentiation.

Respectfully Submitted,
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Counsel for Petitioners.

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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1924.

A. G. RISTY, ET AL, AS COUNTY COMMISSIONERS,
ETC. ET AL,

Appellants, now Petitioners,
vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY
COMPANY,

Appellee, now Respondent.

Also the five other cases set forth on the cover page hereof
Numbered 451 to 456, inclusive.

**SUPPLEMENTAL ARGUMENT FOR PETITIONERS IN
REPLY TO RESPONDENTS' BRIEF.**

I.

The respondents in their statements and briefs misapprehend the question that is before this Court. This, for one thing, is made manifest by the injection of matters that can

not have any possible bearing on the controversy this Court is to pass upon. In their answer they assert that "the first intimation contained in the record of any thought of assessment of or attempt to assess any part of respondents' property appears in a notice published in April, 1919, (being of a hearing upon a matter of equalization of benefits resulting from said drainage district No. 1 and 2). The statement is a mistaken one, because the original drainage petition filed August 3, 1916, specifies, in a general way, the respondents' property, and the property is again described, in a general way, in the notice given prior to the establishment of said drainage district.

But, be that as it may, it is all immaterial. The sole question that is material is whether or not such a conflict has developed between the highest court of the state and the Circuit Court of Appeals, that *certiorari* should interfere on the authority of the *Forsythe* case. (17 Sup. Ct. Rep. 665). So also of the statement "that regardless of whether or not the alleged new drainage district has been legally constituted respondent was entitled to the relief asked because of the arbitrary and discriminatory acts of the petitioners" which (it is said) brings respondents "within the rule of the case of *Thomas vs. K. C. S. Ry. Co.*, 67 Law. Ed. 758, and *Railway v. Risty*, 282 Fed., 364 (the latter being the very case which we assert is in conflict with the decision of the Supreme Court of South Dakota in the *Gilseth* case). It is to be said in the first instance that if there be any color in the cited cases for the claim that is made for them, such claim is distinctly and fully negatived by the case of *Milheim v. Moffatt Tunnel*, 43 Sup. Ct. Rep., 694.

But, be that as it may, the fact that one is rightly entitled to relief because of arbitrary and discriminatory acts practiced upon him, does not relieve this court from resolving a conflict arising because the highest court of a state asserts that a certain drainage project was validly established and a

Federal court asserts the contrary. It is not out of place here to say that relief can be had against arbitrary and discriminatory action without having a Federal court create such a conflict. In other words, a holding that a drainage project was not validly established is not the only method of giving relief for arbitrary and discriminatory action. But, at any rate, whether or not there was such arbitrary and discriminatory action can, at the most, only go to the question of whether the Federal court, rather than the state court, was right. That question is to be argued after the writ of *certiorari* has been granted. At this time we have a right to the writ in order that it may be determined which of the two counts was right, thus eliminating the conflict that now exists. And for that matter — there is the question of whether the Federal court was not bound to follow the statute construction of the South Dakota court, be that right or wrong.

II.

The respondents misapprehend the issue on power to drain agricultural land. We do not assert any conflict exists on this head. The conflict is on whether lands drained, other than agricultural land, can be assessed for benefits without the establishment of a district specially therefor. The project at bar includes both agricultural lands and lands that are not of that character and the commissioners found the necessity therefor on the ground of a public purpose including the drainage of agricultural land. (P. R. p. 52). The Circuit Court of Appeals says that as to the lands other than agricultural, there was no power to proceed as the board of commissioners did, because no statute warranted their action in the premises. The Supreme Court of South Dakota (*Lumber Co. v. McMacklin*, 141 N. W., 382) rules:

"The legislature may *dispense* with the organization of drainage districts and vest the corporate authorities of counties, townships and municipalities with such powers. It would seem equally clear that in such cases the

acts of the corporate authorities would be the acts of the county, township or municipality. The legislature chose the second alternative and vested such powers in boards of county commissioners."

Again in *Davidson County, et al, v. Watertown Tile & Construction Co., et al*, 196 N. W., 96, the South Dakota Court said:

"By Article 21, Sec. 6, of the Constitution, the Legislature was empowered to provide for either of two methods in authorizing drainage work. It might provide for incorporated drainage districts and vest the corporate authorities thereof with the necessary power, or it might *dispense* with the incorporation of drainage districts and vest the necessary power in the corporate authorities of counties, townships, or municipal corporations. In preparing for what the Code calls 'Intra-state Drainage', Sections 8458—8491, Rev. Code 1919, the Legislature *chose the latter method*, and vested the necessary power in the corporate authorities of counties, to-wit, the boards of county commissioners."

About the only argument that remains is also made, to-wit: that this question has not been squarely passed upon by the highest court of South Dakota. What we have just quoted is all that it is necessary to say to refute that argument.

III.

One theory indicated in the respondents' answers seems to be that the decision by the Supreme Court of the State of South Dakota should not be held to be controlling here, because respondents were not a party to it. Surely, the Federal courts may not indulge in a conflict with the highest court of the state, merely because the last named court settled a *status* in a case wherein the particular party present before the Federal court was not a party. It is elementary that as to matters *in rem*, such as the settling of whether or not a

drainage project does or does not legally exist, all the world is a party. The consequences of a contrary view are manifest. If there be a conflict as to the *status* of this project, the writ should not be denied because a party is promoting the conflict who was not a party to the decision that fixed the *status*. If the conflict exists, it exists no matter how many persons were made or not made a party to either of the proceedings said to be in conflict. And what has just been said applies as well to the statement:

“Respondent had no property within the original drainage area; it was not a party to the original proceedings; it was not named, nor any of its property described or referred to in the proceeding resorted to for the purpose of enlarging the drainage area.”

which, by the way, is not true as to describing property, for, in a general way, in the petition and original notice issued thereon, before the drainage was established, the respondents' property was described. (P. R. pp. 47-59, in case No. 451).

IV.

It is next asserted that the Gilseth case really never made any actual decision that conflicts with the rights of this respondent (which in a sense is a repetition of the allegation that respondent was not a party to that suit). What is really emphasized, is that whatsoever may look or read like the making of general law declaring that this particular project is legally established, is really in the nature of a *dictum*.

The main argument, as we construe it, seems to be that the Gilseth case really did not establish a *status*, and really did not intend to make any general law as to what was a lawfully established drainage project, but that in a suit, to which respondent was not a party, Gilseth was defeated by reason of an estoppel personal to himself. Related to this is the statement that there was such conduct on the part of Gilseth

as really estopped him from ever bringing the question of the legality of the drainage project in question into a court at all. Of course, if that is so — if the case rests on such estoppel rather than on disclosing incidentally that one might be asserted — then the respondents are not bound, and as to them nothing has yet been done that makes a conflict. Of course, this involves the examination of the Gilseth case and perhaps other cases.

Whatever is said in the Gilseth case with reference to estoppel is clearly purely incidental. It is one of these familiar illustrations of a court deciding a case and then saying that, if by any chance, the decision might be challenged, that at any rate something else exists that does not permit some people to challenge it. It is the familiar *deciding* of a case and then giving additional reasons for so deciding. Of course, it is elementary that this last reason detracts nothing from the binding effect of the real decision.

Now, how can it be said that the Gilseth decision rests on an estoppel. We find it is determined that the filing of a petition with a board of county commissioners asking for the establishment of a drainage district, gives the board jurisdiction to proceed with the inspection and survey, as required by the named statutes of the state; that on the filing of the surveyor's reports on the contemplated district, the board fixes a time and place for the hearing on the petition, pursuant to other named statutes; that where no appeal is taken from an order establishing a new district, the order becomes final and there cannot be any question of the jurisdiction of the board to proceed to carry out the work contemplated by the petition; and that the fact that a project contemplated in a petition for drainage involves the repair of an old project, does not affect the authority of the board to proceed, (basing this on a construction of the Constitution of the State, and of certain named statutes).

Suppose it is true that the particular litigant who obtain-

ed this decision should not have been successful, in any event, because of his own conduct. The court might well have refrained from settling the *status* of the project by declaring, at the outset that the right person was not invoking its powers. It saw fit in the Gilseth case to waive that position, and, as it could, proceeded to make authoritative and relevant declarations which all go to the proposition other than estoppel — to declare that no valid objection lay to this very project, and that it had been lawfully prosecuted. If the English language means anything, the Circuit Court of Appeals held to the exact contrary. To be sure, it did not do it for Gilseth, but did do it for certain others that would have been compelled to contribute if benefitted, if the the Circuit Court of Appeals had followed the Gilseth case.

It all amounts to this: If this conflict is not resolved by this court, every person subject to taxation for this project, except Gilseth, and the parties to the controversy now before this court, can hereafter enter the Federal court in South Dakota and assert that they should also be exempted from contribution on the authority of the said decision of the Circuit Court of Appeals. When that assertion is made, and in each and every one of the cases in which it is made, that will be the assertion on one side. And the other side will insist that contribution should be made despite the said decision of the said Circuit Court of Appeals, because of the decision in the Gilseth case.

This answers, too, the assertion that it is not clear that there is a conflict between the State and Federal Courts.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1925

No. 95

A. G. RISTY, et al, as County Com-
missioners, etc., et al,

Appellants,

vs.

CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY,

Appellee,

And the Five Other cases set forth on the cover
page hereof numbered 95 to 100 inclusive.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1925

No. 95

A. G. RISTY, et al, as County Commissioners, etc., et al,

Appellants,

vs.

CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY,

Appellee,

And the Five Other cases set forth on the cover page hereof numbered 95 to 100 inclusive.

BRIEF AND ARGUMENT FOR APPELLANTS

Throughout what follows the Chicago, Rock Island & Pacific Railway Company will be referred to by the letter "R"; the Chicago, Milwaukee & St. Paul Railway Company by the letter "M"; the Chicago, St. Paul, Minneapolis & Omaha Railway Company by the letter "O"; the Northern States Power Company by the letter "P"; the City of Sioux Falls by the letter "S" and the Great Northern Railway Company by the letter "N".

Reference to any bill of complaint will be prefaced by the number of the ground of the bill and followed by the designation by letter above set forth; e.g., 5-B-M means Ground 5 Bill filed by the appellant Chicago, Milwaukee & St. Paul Railway Company; 5-A-O means Ground 5 of the Answer filed in the case of Chicago, St. Paul, Minneapolis & Omaha Railway Company.

The first set of figures following any reference to either bill or answer states the page of the printed record; and where this is followed by a dash and still other figures this reference is to the page of the typewritten transcript.

OPINIONS OF LOWER COURTS.

The lower courts tried these six cases together and decided them with a single opinion reported as follows: District Court, 282 Fed., 364; Circuit Court of Appeals, 297 Fed., 710. (Also M. 75; R. 249).

JURISDICTION OF THIS COURT.

The judgment to be reviewed is dated the 18th day of March, 1924. (R. 265-267; M. 358-359; O. 235-236; P. 303-304; S. 283-284; N. 293-293). Appealed, May 31, 1924. (R. 267).

The bills allege that the South Dakota drainage statutes are in contravention of the due process clause of the Fourteenth Amendment to the United States Constitution, and complainants are not afforded the equal protection of the law, in contravention of the Federal Constitution. (R. 15-20; M. 15-21; O. 15-21; P. 14-21; S. 13-19; N. 13-20).

That more than \$3,000.00, viz.: the amount of the threatened assessment is involved. (R. 13-20; M. 14-20; O. 14-20; P. 13-19; S. 9-13; N. 13-19).

The Court ruled that there were substantial Federal questions involved. (R. 253-255).

That more than \$3,000.00 was involved in each case, and sustained the order of the trial court granting the injunction, thereby preventing the appellants from ever making an assessment against appellees as apportioned, or at all, and therefore, there is now more than \$1,000.00 involved. (R. 247-248).

These appeals are brought under authority of Judicial Code, Section 241.

Butte & S. Copper Company vs. Clark-Montana Realty Company, 249 U. S., 12; 39 Sup. Ct. Rept., 231.

American Sugar v. New Orleans, 181 U. S. 277.

Howard v. U. S., 184 U. S. 881.

Union Pacific v. Harris, 158 U. S. 326.

One of the appellees, to-wit, the Northern States Power Company, moved in this Court that the appeal in its case be dismissed. It involved a situation identical, on this head, with the other five appeals. Said motion was by this Court overruled.

PREFATORY STATEMENT AS TO THE NATURE OF THE CONTROVERSY.

I.

At the outset there is question whether this Court does not lack jurisdiction because the District Court lacked it.

Five of the six appellees have diversity of citizenship. They also raised federal constitutional questions. If there is in truth more than three thousand dollars exclusive of interest and costs in controversy, the District Court may had jurisdiction. The sixth appellee, the City of Sioux Falls, does not have diversity. But without reference to that, it is claimed each of the six appellees had the right to enter the District Court if a substantial question as to the application and construction of the Constitution of the United States was presented, and we concede that if appellees had the right to enter the federal court at all it is immaterial what happened after they entered, and concede there was power to determine all questions presented even though the decision on a substantial federal question was adverse to those who entered the court. The District Court, found that the attack on the statutes of South Dakota for being in violation of the Constitution of the United States was not tenable. And it is conclusively shown that this ruling is correct. The Circuit Court of Appeals affirmed this but with the statement that it was not necessary to determine the constitutional question. In other words, that there should be an affirmance even though it be true that said statute did not violate the Constitution. Both lower courts held that the federal questions presented were substantial. It is, therefore, obvious that whether the District Court had jurisdiction depends, for one thing, as to each of the appellees and

upon whether a substantial federal question was presented and as to all but the appellee, the City of Sioux Falls, on whether this court shall conclude the federal question pleaded was not a substantial one and upon whether there was the requisite amount in controversy.

Our position is, first, that no substantial federal question was presented; second, that though it be conceded that appellees were threatened with an assessment in more than three thousand dollars, the amount of benefits apportioned was but tentative and subject to later equalization, and that, therefore, the question of the amount involved was based purely upon speculation as to what the amount would be when finally fixed, and that therefore these suits were premature; and no sufficient amount in controversy is exhibited.

Related to this, is our contention that there was no jurisdiction on the equity side because at most, nothing is exhibited but the mere possibility of being subjected to an illegal tax. Injunction will not lie even when an illegal tax is actually sought to be enforced and it does not lie, in any event, where there is a mere possibility that there will be such an assessment and thereafter an enforcement. We therefore submit that though it is true an injunction may be granted where coupled with an attempt to exact an illegal tax there are other necessary elements to support chancery jurisdiction viz. fraud, casting cloud on title, or multiplicity of suits, these cases have no such elements.

The fraud upon which the lower courts fasten is the claim, in four of the bills, that in the guise of repairing established ditches which appellees claim the appellant board had built badly, it pretended to establish a new drainage project with the purpose of thus obtaining money in an unauthorized way for the repair and maintenance of the old ditches. The appellees Omaha and Milwaukee conceded, in the Circuit Court of Appeals, that this was not so. There is no allegation of fraud on part of the other four appellees except the said claim. We contend that this is not a sufficient pleading of fraud, in a collateral action, but if this be treated as such, there

is no proof sustaining it.

II.

As seen, it was the holding below, from which no one has ever appealed, that the drainage statute of South Dakota, and all that was done, do not violate the Constitution of the United States. But there is a casual remark in the opinion of the District Judge to the effect that something done denied the equal protection of the laws. On giving the opinion reasonably full consideration it becomes plain that what is meant is that the Court found that the procedure of the board was arbitrary, because (a) some of the territory in which the appellees have property should not have been included in the area of the new drainage project; (b) of apportioning benefits by what is called the unit method; (c) discrimination in favor of agricultural lands; (d) because appellees were either receiving no benefit or were threatened with an assessment grossly disproportionate to the amount of benefits received.

As to this, it is our position that none of these contentions are sustained by the proof, but even if they were, that is immaterial because those were all questions to be presented to and in the first instance determined by the board, and, if need be, on appeal to the regular courts of the State, that no one may enter any court, in the first instance, to have these matters determined there on application for an injunction; and that in collateral attack such as the one at bar it is not permitted to enter any court to raise such questions as the above before having exhausted the tribunals provided by valid statutes for determining those very questions.

III.

The complainants allege that there were many instances of failure to comply with the statutes of South Dakota. For instance: (a) that no order was made establishing the new drainage project; (b) that none was made giving it the designation now asserted for it; (c) that there was no resolution fixing the route, etc.,

of the ditches; (d) that certain things required to be filed were not filed; (e) there was a failure to act by resolution in ordering surveys, or providing for the fixing of benefits; (f) that things required by statute to be transmitted to the state engineer were not transmitted; (g) that things required to be recorded or indexed were not recorded or indexed.

We contend the proof does not sustain any such claims made, but that it is immaterial whether it does or not. This, because the highest court of the State has had before it this very drainage project and in construing the statutes of the State and the acts of the board held that there had been such substantial compliance with them as that jurisdiction was acquired. (Gilseth case).

IV.

The Court held that the new project was not for the purpose of draining agricultural lands, and we must concede that the project included property not used and in instances not usable for agricultural purposes. As to this the courts below held the board lacked all authority because while the Constitution of South Dakota gives the legislature power to provide for drainage other than that of agricultural lands the legislature has not exercised such power; that, therefore, there is no power in the board to establish drainage for what is merely "a public use" — that drainage for such public use as distinguished from draining agricultural lands can be initiated only by distinct corporate entities created for so establishing.

It is our answer that both Constitution and statute gave this board power to do just what it did and that the highest court of the State in construing the Constitution and statutes of the State so ruled, in what is known as the Gilseth case, 46 S. D. 374; Tile case, 47 S. D. 101; McMacken case, 31 S. D. 507.

V.

The appellants urged various estoppels based on what they allege the conduct of appellees to have been. For illustration, that appellee City of Sioux Falls was one of the signers of the petition upon which the construction of the project at bar was based. The Circuit Court of Appeals held that though said acts had been done, this constituted no estoppel.

When we reach the argument of case required by division (d) of rule 25, we shall, in so far as we deal with the foregoing matters, give page reference to the printed record.

We now proceed to a somewhat more extended presentation of the scope of the controversy at bar.

The Appellants Risty and others constitute the Board of Commissioners of the County of Minnehaha in South Dakota. Other appellants are respectively the Auditor and Treasurer of that county. The appellant board in 1916 entered upon a drainage project known as "Drainage Ditch No. 1 and 2", and practically completed it. It issued drainage warrants in approximately \$250,000.00 which were issued to defray the expense of said construction. The intervenors are the holders of those warrants. When the said project was practically completed, except some minor adjustments, the Board proceeded to make an apportionment as to benefits alleged to have accrued from said construction. This apportionment was in a sense merely tentative because opportunity was afforded to have said estimate of apportionment of benefits revised at a hearing appointed on notice given for the purpose of equalization. It could not be definitely known how much any property owner would be assessed in dollars and cents until after said equalization had been completed. No assessment to collect for alleged benefits received has yet been made,

nor attempt made to collect any of the cost of construction.

At a time when the drainage project had been completed, except some minor adjustments, and paid for by warrants and when as yet there had been no equalization, and though there was neither assessment nor attempt to collect same, the appellees in July, 1921, instituted six separate actions in the district court of the United States for the District of South Dakota, in which they assert that said proceedings on part of the Board were void, *first*, because the drainage laws of the state under which the Board had proceeded were violative of the due process clause of the Fourteenth Amendment, and of the guaranty of the Federal Constitution that no one should be denied the equal protection of the laws; *second*, that said proceedings were violative of the provisions of the constitution of the State of South Dakota; *third*, that if the statute laws of the State were constitutional so far as the constitution of the United States is concerned, the statute law under which the Board was proceeding was void because the Constitution of the State gave no authority for such statute law; *fourth*, that if said statute law violated neither constitution, the Board had so neglected and failed to proceed according to the statute law as that it never acquired jurisdiction in the premises, and *fifth*, that there was such disregard of the statute and such irregularity on part of the Board as that therefore it acquired no jurisdiction.

Both lower courts held that the project at bar was a subterfuge resorted to to get money that might be raised for a new ditch, for use in merely repairing an existing ditch and that there had been no compliance with the Statutes governing the repairing of existing ditches. Held, that only old territory was assessable and the attempt to bring in new property was void. (M. 90). This holding was made even though appellees Omaha and Milwaukee conceded that the project was the creation of a new drainage project, and even though, as appellant contends, the undisputed testimony shows that the project was a new and independent drainage

system.

The petition alleges that unless the district court enjoined, the Board would assess; that appellant county auditor would spread such assessment upon the record; that defendant county treasurer would collect said tax; that this situation gave the district court jurisdiction on the Chancery side, *first*, because the threatened proceedings would cast a cloud upon the title of the property owned by appellees; *second*, that such proceedings would cause a multiplicity of suits; *third*, that as against all this appellees have no speedy, adequate and plain remedy at law, at least, none on the law side of the Federal court.

The relief prayed was that each defendant and his agents, servants, employees, attorneys and successors in office be enjoined from proceeding further in the making of an apportionment of benefits upon the property of plaintiff for the construction of said drainage project; from proceeding in any manner under the "purported" statute law of the State of South Dakota; from any act looking toward the apportionment of benefits for any work heretofore done on said project; from doing any act tending towards the making of an assessment for the cost of any such work before done; that defendant county auditor be enjoined from making any apportionment of benefits for such work and from making any assessment therefore and from certifying any assessment thereof to the county treasurer; that the defendants, members of the Board of Commissioners, and their successors in office be enjoined from fixing any apportionment of benefits for the construction of said drainage system upon the property of plaintiff, and enjoined from making any assessment against plaintiff or its property or against the property of any other property owner in the area of the project for the costs of said work; that defendant county treasurer and his successors in office be enjoined from filing any assessment or collecting one against the property of the plaintiff or the other property owners named in the notice which the defendant

board had given.

It is further prayed that "the said purported statute of the State of South Dakota" be adjudged and decreed to be unconstitutional and void; that all acts of said board and of the state engineer of the state heretofore done on said project be adjudged and decreed to be illegal and void; that it be adjudged and decreed that no benefits have resulted to plaintiff from the construction of said drainage project, and be adjudged and decreed that no apportionment of benefits or assessment of damages be ever made against the plaintiff or its property, therefor. (M. 22-15, 16, 17-22, 23, 24; O. 16, 17-22, 23, 24; R. 15, 16, 17-22, 25; P. 15, 16-21, 22, 23; N. 14, 15, 16-21, 22, 23; S. 14, 15-20, 21, 22).

The District Court granted the said injunction as prayed, but in doing so found that the drainage statutes of the State were not in violation of the Federal Constitution; it also found, that while this was so, the claim that there was such violation of the Federal Constitution was a substantial one.

There was a motion to dismiss, presenting grounds, among others, that the Court had no jurisdiction because the administrative proceedings provided by the laws of the State had not been exhausted prior to instituting these actions, and that full notice and opportunity to avail of that procedure had been given. (R. 209-318; R. 210-319; R. 254-382). Said motion was overruled pro forma. (R. 210-319).

From the decree these appellants perfected an appeal to the Circuit Court of Appeals from the Eighth Circuit. That court affirmed, generally, but in dealing with the constitutional question, it declared it was not necessary to determine whether there was a violation of the Federal Constitution and that there should be affirmance even though the statute law of South Dakota did not contravene that constitution. It, however, re-iterated the finding below that the said questions were substantial federal questions.

The proceeding at bar is an appeal from the said decision of the said Circuit Court of Appeals.

**STATEMENT OF MATTERS MATERIAL TO CON-
SIDERATION HERE.**

AS TO AMOUNT IN CONTROVERSY.

Section 8463, Revised Code, South Dakota for 1919, provides that "after the establishment of the drainage and fixing of the damages, if any, the board shall fix the proportion of benefits of the proposed drainage among the lands affected". It further provides that "the proportion of benefits which any * * * * city * * * and the proportion which any railroad company may obtain for its property by such construction shall be fixed and equalized together with the proportion of benefits to tracts of land".

By Section 8464, it is provided that "after the equalization of the proportion of benefits, the board may make an assessment against each tract of property affected in proportion to the benefits as equalized".

The Circuit Court of Appeals finds that on June 10th, 1921, the board by resolution fixed a proportion of benefits in units which it had decided to be a fair method of arriving at these benefits. (R. 251). This apportionment of benefits is found on (M. 19; R. 19; O. 19; N. 19; S. 17; P. 19). Thereafter a resolution passed fixing the time and place of equalizing and it provided for lawful notice of the proposed equalization. (M. 48, 49; S. 36, 40; N. 36, 37, 38, 40, 41; P. 37, 38, 41, 42; R. 37, 38). Before the equalization was entered upon the present suits were brought. The District Judge states in his opinion that no assessment can be made or any tax made effective until the benefits have been ascertained and equalized. (M. 79, 80). The defendants allege they have no knowledge of the total in dollars that will finally be equalized and assessed against the property of each of the appellees. (N. 37; S. 36; P. 38; R. 38).

The opinion of the District Court finds that it is

only after the proportional benefits are finally determined that the Auditor spreads the tax, and it becomes a lien on the property benefited. (M. 79,80).

The Circuit Court of Appeals agrees with appellants that a future undetermined, unequalized, and unspecified tax cannot be taken into consideration as to the amount in controversy — that the Court cannot engage in speculation as to such taxes (R. 262), but it affirms the holding below that a sufficient amount was in controversy, thus:

“As the proportion of benefits had been fixed subject to change by the board only if appellee should convince them that their conclusion was erroneous, and in view of the claim in apparent good faith in each of the bills that the amount involved exceeded the jurisdictional amount, we hold, from a careful survey of the entire record, that the necessary amount existed in each case to give jurisdiction to the federal court.” (R. 263).

It said further:

“It is suggested that the Board may so equalize benefits that the jurisdictional amount will not be involved, but as the matter stood when the case was brought, each appellee was threatened with the levying of a tax for more than the jurisdictional amount, and some of the necessary steps had already been taken.” (R. 263).

As already shown, the only steps that had been taken were merely preliminary to what might by possibility later become a tax for an amount greater than three thousand dollars, to-wit: fixing the proportion of benefits and notifying of time and place when the equalization of the benefits apportioned would be entered upon.

The City of Sioux Falls does not have diversity, and unless it presented a substantial federal question had no right to enter the federal court, assuming it had the right to enter at all, no matter how much was in controversy.

IS THERE A SUBSTANTIAL FEDERAL QUESTION.

We do not have the question whether the statute law involved was violative of the federal constitution. The District Court finds it was not. It declares it finds that all of the (constitutional) objections center about the criticisms that no notice is provided the owners of land affected by the drainage ditch, except the general notice, and in fact, no personal notice until the date fixed by the board for the equalization of proportional assessment for the various tracts of land benefited by the drainage. (M. 79, 80). It finds that the attack on the validity of the statute law is not tenable. (M. 80, 81, 82, 83). Of course appellants are satisfied with this holding and have never made it the subject of an appeal, and appellees have neither appealed nor cross appealed. What is now to be determined then is not whether the South Dakota statutes are unconstitutional but whether the appellees were in reason justified in their claim that they were. In other words, whether the finding of each of the lower courts that a substantial federal question was presented is sustained by the record. (M. 83; R. 263). At this point we merely state, we claim it was so thoroughly settled in the law that the South Dakota statute law in question violated no provision of the federal constitution as that any claim that it did so violate is unsubstantial and insufficient to give jurisdiction. It is obvious that elaboration on this has no place in this statement and that the proper place for it is in the argument and possibly in the brief. It will be elaborated later.

It is not amiss, however, to say here that in a way one objection to constitutionality was that the board had proceeded in an arbitrary and discriminatory manner, and that possibly it was intended thereby to claim that thus the constitution of the United States had been disregarded. We answer that no such objection was sustained in either of the lower courts. True, the Rock Island does plead that the equalization is so arbitrary and discriminatory as to violate constitutional provisions

(which provisions not stated) against depriving of property without due process of law and forbidding denial of the equal protection of the laws; (15 — 21); wherefore we answer as to at least five of the appellees that if it can be held (and we deny it) that such claim was made in pleading that neither of the lower courts sustained such an objection; that neither held the federal constitution had been violated in any respect, and that moreover the record establishes conclusively that there was neither arbitrary conduct nor improper, if any, discrimination. Our view is that the lower courts found there was arbitrary conduct and improper discrimination and that this deprived the board of authority without any reference to whether such arbitrary conduct and discriminatory action constituted a disregard of the federal constitution. With this holding and the evidence upon it we will deal in another place in this statement.

CHANCERY JURISDICTION AND PREMATURETY.

The trial court held that its equity side had jurisdiction and the Circuit Court of Appeals affirmed this.

The bills allege that the threatened apportionment of benefits would cause multiplicity of suits. (S. 13, 14; N. 13, 14; P. 14, 15; R. 15; O. 15, 16; M. 15). Issue on this allegation was joined. (M. 22, 23; R. 23, 24; O. 23; N. 22, 23; S. 21; P. 23, 24).

Another allegation is that this apportionment would cast a cloud on the title of appellees to their real property. (S. 13, 14; N. 13, 14; P. 14, 15; R. 15; O. 15, 16; M. 15). Issue was joined on this. (S. 36; M. 38; P. 38; N. 37; O. 38).

Another allegation is that if this apportionment is carried out, plaintiff will suffer immediate and irreparable injury. (S. 13, 14; N. 13, 14; P. 14, 15; R. 15; O. 15, 16; M. 15).

Finally it is alleged that if this apportionment is carried out, plaintiff will be without plain, speedy, and adequate remedy at law. (S. 13, 14; N. 13, 14; P. 14, 15; R. 15; O. 15, 16; M. 15).

The defendants pleaded in bar that the plaintiff does have such remedy at law. (M. 22, 23; R. 23, 24; N. 22, 23; P. 23, 24; O. 23; S. 21, 22). — And that the bill states no matter of equity entitling plaintiff to the relief prayed for, because it has such remedy at law. (M. 22; P. 23; S. 20; O. 22; N. 22; R. 23).

The trial court held that it conclusively appears on the face of the pleadings there is no speedy or adequate remedy at law, and that the remedy at law must be on the law side of the federal court and not a remedy in the state court, because the non-resident is not required to subject himself to the jurisdiction of the courts of the State in order to obtain relief. (M. 83).

While the court says there is allegation of a lawful ditch, it declares that the board are mere trespassers

(M. 84), because the new ditch was in fact and in law never established (M. 89, 90), it holds that if either plaintiff was compelled to pay this tax no action to give them relief would lie on the law side of the federal court. (M. 83).

The Circuit Court of Appeals concedes that injunction will not lie where all that is presented is an illegal tax. (R. 261). It rightly states that where in addition to the illegality of a tax there exists one or more of the grounds upon which equity takes jurisdiction, the jurisdiction may be entertained even though one thing involved is the existence of an illegal tax. It states, as we contend, erroneously, that the said general rule does not apply where it is involved that the proceedings concerning the tax were without authority. (R. 252, 253). It states further, again erroneously, as we contend, that the jurisdiction will attach merely because there is threat of an illegal tax. (R. 259, 263).

We concede that equity has jurisdiction where there is exhibited either irremediable injury, multiplicity of suits, vexatious litigation, or the casting of a cloud upon title. The bills did make claim that these conditions existed and the Circuit Court of Appeals found that the contention was sustained. (R. 259). — And at this point we contend that the record does not sustain this finding, so far as the chancery heads other than fraud is concerned.

AS TO THE ASSERTION OF FRAUD.

The pleading is a charge on information and belief that less than thirty-five per cent of the total expenditure was for the purpose of constructing ditches and to straighten out the channel of the Sioux River, and that less than five per cent was expended for any purpose legitimately connected with the construction or maintenance of the old ditches. (P. 12; N. 9, 10, 11; R. 10, 11; S. R. 10). — And that by the filing of the petition the board acquired no jurisdiction to assess for the cost of the necessary repairs and maintenances of the old ditches. (M. 14, 15; O. 14, 15). It is further alleged that the change in the channel of the Sioux River and its going through the outlet of the old ditches at a point north of the city of Sioux Falls would, if permitted to become permanent, have operated to relieve the lands drained by the old ditches, and lands adjacent thereto, of surface water, and that all that was necessary was to permit the water to flow unhindered through the old ditches into the river and to allow the new river channel to be drained by the natural course of the water flowing through them. (M. 18, 10; O. 8; — Denials M. 30; O. 30).

The defendants plead that when the new project was entered upon they immediately reconstructed the spillway and outlet to the old ditches in a more substantial manner under the supervision of the state engineer and at a cost of more than \$100,000.00. (M. 35; O. 34, 35, 36; S. 32, 33, 34, 35).

In effect the issue on the face of the bills is whether the project at bar was a mere subterfuge because all the board was authorized to do was to repair and maintain the old ditches and, instead of doing this, used but a very small part of the total expenditure for that alleged lawful purpose.

We find that both the lower courts greatly broadened this issue. The trial Judge found that everything

done came to merely giving the old ditches a new name; (M. 89); that the assessment upon plaintiffs was a mere afterthought. (M. 91).

The Circuit Court of Appeals found that the proceedings were a mere subterfuge because there had never been an abandonment of the old ditches, and that all that was done could be lawfully done only on statutes governing procedure in case of abandoned ditches. (R. 253). At the same time it found that on April 8th, 1916, a petition was filed asking among other things that the old spillway be closed and abandoned and the course of the old ditch extended in a southerly direction, *and that the board passed a resolution that said ditch be permanently closed above the present spillway or outlet thereof.* (R. 250).

Another basis for its finding that here was a subterfuge is that some of the appellees had no property in the original ditch area, while others did have, and that the appellees who have no property within the original area were brought into a new district and made liable for further assessments for maintenance and repair of ditches. (R. 252, 262). It is not made clear whether the flaw lies in bringing a party into the new district or in the fact that there is a claim they were brought into a new district where there was but a pretense of an independent project when in truth nothing was to be done or done except to maintain and repair ditches in territory in which the party brought in had no property.

It concedes that the original system became so defective in 1916 as to threaten great and irreparable injury and that it was this the board took steps to remedy; also, that the board proceeded to establish the so-called new drainage system upon a petition which had for caption: "To reconstruct and improve drainage ditches No. 1 and 2 (the old ditches) and to construct a new spillway or outlet to said drainage ditches and to pay therefor by an assessment upon the property, persons, and corporations, benefited thereby". (R. 254).

It is further declared that the water of the Sioux

River breaking through into laterals and threatening a change of its course and the possible destruction of state lands, led to no act in relation to the drainage of agricultural lands, but all done was prompted by the failure of the ditches, because of their inadequate or imperfect construction to carry the increased flow of water — and that if the project were an entirely new one, this will not avail because it was not for the drainage of agricultural lands. (R. 257).

The trial Judge held to the same effect, and is expressly affirmed. (M. 85; R. 249, 250).

The conditions of the drainage system existing when the new project was initiated are fully set out in the bills on O. 8, 9; M. 8, 9; P. 8, 9; S. 7, 8; R. 9; N. 8, 9. Also fully set out in the answers which are in substantial agreement with the allegations of the bills. (M. 26, 27, 28, 29; R. 28, 30, 31; S. 26, 28, 29; N. 27, 28, 29; P. 28; O. 27, 29, 30).

It was the view of the trial Judge, in effect, that what the board engaged in was not to create an independent drainage project but to pretend to do so in order to obtain means sufficient to cure its own default in not having constructed the original ditches properly. For illustration, it is said in its opinion that if the spillway had been properly constructed originally, and if it had not proven inadequate, there would have been no cause for action by the board in the year 1916. (M. 93; and see M. 85, 86).

The trial Judge held the board was responsible for the threatened ravages and it was its duty to maintain the old ditches and stop the ravages of the water, and it was this that caused them to construct the spillway in a more substantial way and to dike and to do other things. (M. 86, 87). And that the action of the board was influenced by the thought that the board having conducted the water down into these ditches and because of the inefficient manner in which they had constructed the ditches and built the spillway and the threat

of all resulting damages, it was the opinion of the board that plaintiffs were necessarily to be damaged. (M. 88).

The trial Court concedes that in 1916, the river cut through into the ditches and the latter became clogged in places and not wide enough in others and that the spillway was washed out by the force of the water which was being conducted down the ditch, that there was cutting the bluff, that large areas of land were being washed away and other dangers were threatened; but it holds that still the only proposition presented to the board was on maintenance or taking care of the waters that the board had conducted down the old ditches. (M. 88).

It ruled that nothing but repair and maintenance of what they had established confronted the board, and they should have prevented the danger threatened by the waters they had conducted through the old ditches through the hill into the river. (M. 86, 87).

The trial Judge points out forcibly how great the danger was in 1916 and how radical steps of protection would have to be, but still holds that all that was in fact entertained was a scheme to maintain and take care of the waters that were being conducted by means of the old ditches. (M. 86, 87, 88).

Another reason assigned by the district Judge is that the board had no authority to proceed, first, because it did not act under the statute dealing with abandoned ditches (M. 89, 90), and, second, that the board were mere trespassers because the alleged new ditch project was in law never established and in law has no existence (M. 84, 89, 90), — that by not following Section 8489, the abandonment statute, the board acted absolutely without authority, right, or color of right. M. 89, 90).

One basis on which the district Judge held that the project was a mere subterfuge is to assume it was nothing but a scheme to repair and maintain the existing ditches and upon that assumption to declare the proceedings void because there had been no compliance with

statutes which gave authority for repair and maintenance, statutes that are the only authority for a project that has no object except to repair and maintain an existing drainage system. (M. 87, 88). In like case is the opinion of the Circuit Court of Appeals in making one ground for finding subterfuge by assuming that the old ditches were not abandoned though perhaps a small portion was. (R. 256). And on that assumption it bases a ruling that the proceedings are void because the one statute which is alone authority for dealing with abandoned ditches had not been followed. It even sets out the statute that alone is authority for what it is assumed was done. (R. 255, 256).

Before entering into the state of the proof on these heads we submit that whether this was or was not a subterfuge is not now an open question because, first, appellees had the opportunity to present their claim that they might not rightfully be assessed because no independent project was being formed and could have appealed to the courts of the state if the board had held against them, and having failed to take advantage of this opportunity are now foreclosed on this head; second, the highest court of the state, speaking in the Gilseth case, has ruled that this was in truth a new and independent drainage project and that jurisdiction had been acquired by the board by following the statute relevant to the establishment of new drainage systems.

If not overlooked by the Circuit Court of Appeals, there is a disregard of the fact that the appellees Omaha Railway and Milwaukee Railway concede in their brief in that court that the board resorted to no subterfuge and that it constructed a drainage system which was new and independent and made no effort, in the guise of establishing a new project, to raise money wherewith to repair and maintain existing ditches.

Coming now to the evidence, it appears that in July, 1916, one Thompson and others in due form asked the board to permanently close and abandon the southern end of one of the ditches about a mile in length and including the site of the destroyed spillway and to establish a new outlet for it through Covell's Lake and thence back into the river. (R. 224 to 229). The petition of the City, F. L. Blackman and others, was presented on August 3, 1916, and prayed the establishment of a new and enlarged drainage district with suggestion that the old ditches be enlarged and improved. It prayed that the canalizing of the course of the river adjacent be a part of the new project. It suggested the enlargement of the assessment area so as to include about ten sections of land additional. (R. 42).

This is the petition upon which the new drainage project was established. (R. 51).

Waite says that he asked Rettinghouse in regard to the watershed in this drainage area, and he thinks he said it was 4500 square miles. This was the whole watershed. (R. 179).

There is in evidence the commissioner's report, 5 pp. 562, 563, in which it is recited that the board had resolved that the width of the old drainage ditch No. 1 be and is fixed at forty feet at the bottom, with a side slope of one and a half feet to one. (M. 119). The same is shown by drainage ditch record A. pp. 121 to 123, inclusive, and with reference to old drainage ditch No. 2. (M. 159).

Risty testified the new ditch is in the neighborhood of eighty to one hundred feet wide as far north as Renner. (M. 266; R. 165).

The work of construction was upon plans approved by the state engineer. (R. 164; R. 204). Risty says that after the filing of the Blackman petition in 1916 and when it was decided that the spillway was to be repaired the board employed engineers to investigate it; that at this time about a year and a half before all the

preliminaries were cared for, and before the board went to actual excavation; it employed a competent engineer to lay the plans.

Rettinghouse says the ditch was constructed for the prime purpose of draining this section of the country, and inlets have been made at various points, at roads and intervening points, to permit this surface water to drain into the ditch (R. 237), — that through said Section 2 the ditch runs in the lowest part of the country east of the river and serves the purpose of a drainage ditch as well as one to care for overflow and it was put in for the double purpose of serving both ways. (R. 237).

Risty says if there are heavy rains on the lands adjoining the ditch running north and south it will flood the lands on either side of it and it was the intent and purpose that the ditch should take care of such flood water — that the real purpose of the ditch as he understood it is to take the water from the river in flood times and conduct it down to the spillway into the river at the mouth of the spillway and to prevent overflow to a great degree from spreading over the farm lands. (R. 209).

Thompson says the intake of the spillway at the lower end of ditch No. 1 is rip rapped, then there are two gates leading into a hole that goes down through the ground about 40 feet. The shaft is perpendicular for about 40 feet. At the lower end of it a channel is run out towards the river towards the east sloping downwards so that it comes out just above the river level on the lower end. (R. 204).

Rettinghouse says the discharge capacity of the ditch at its lower end was something like three thousand feet of water per second. (R. 243). And thinks a majority of that water came out of the river during flood stage. (P. 294).

Barlow says his understanding is that the spillway is designed for 2000 second feet and could take an over-

load of 500 more, making a total of 2500 feet. (R. 170, 171).

There is a very great amount of testimony showing so much work and kind of work as to demonstrate that here was no mere plan to repair. (R. 161, 164, 204; R. 165; R. 231, 237, 238, 241; M. 261, 262, 266, 342, 362).

The Circuit Court of Appeals found that the total original cost was only \$127,706.29. (R. 185; R. 224 to 229).

The cost of old drainage ditch No. 1 was \$46,600.10. (M. 155); that of old drainage ditch No. 2 was \$81,106.11, making a total of \$127,706.21. (M. 202, 203).

The cost of the new drainage ditch was \$309,221.40. (M. 18).

The effect of canalizing the river and enlarging the ditch, of constructing and installing wiers, dams and controlling works and a substantial spillway was to create a double and more perfect system of drainage. (R. 41).

The object of the new project was to establish a more perfect drainage system with more substantial controlling works and equipment and to create ditches of more than double the capacity of the original one. (R. 19).

By handling more water than the original ditches could the new area was proportionally increased to cover all the land described in the notice of equalization. (R. 19).

Thompson says the old spillway was washed out in 1916. (R. 204). — And the present spillway was finished in 1918. (R. 204).

Risty says that where the board diked, the ditch had taken the channel of the creek where there had not been enough dirt taken out to make a dike, and when the floods came the waters backed up on the farm lands to the west; that the board diked there probably five or

six feet high thus protecting these lands after that. (R. 165).

Rettinghouse says the ditch takes one-third of the water carried by the river on as close an estimate as is humanly possible and it may be more. (R. 241).

The original course of the Big Sioux River adjacent to these ditches was very crooked. (Map R. 185).

Risty testified there are pipes here and there around the ditch to let water in when the bottom land overflows, and it has been proven these ditches drained the bottom lands because there are farms all along, and it has lowered the water in their wells to a very considerable extent since the ditch was dug — and “they proposed” to have the gates in the embankments so that when the pressure was from the inside it would close the gates, and if from the outside would open them within this pipe. (R. 208, 209).

The trial court disregarded the issue tendered by the defendants that plaintiffs are not entitled to the aid of a court of equity because they have neglected and refused to tender or offer the amounts of such benefits as actually did accrue to them. (M. 49; S. 15; O. 22).

The contention that the project was without authority because it was not intended for the drainage of agricultural lands.

This divides into (a) whether the property of appellees is agricultural land and (b) whether if it be not, whether the establishment of the drainage system at bar was as to these appellees without authority.

It is alleged in various ways that the nature and location of the property of the plaintiffs is such as that it has never been used for agricultural purposes, and is suitable for nothing but uses other than agricultural. (P. b-8, 7; R. 8; M. 13; O. 13; S. 7; N. 7, 8).

Woods testified that a very small part of the Mil-

waukee right-of-way acreage, is taken up by round house grounds and yards near the ice house and most of it is right-of-way, but if there were no railroads through it the most of it could be used for agricultural purposes. (R. 197).

And Bassett, a witness for the plaintiffs, says he knows of no reason why if the tracks were not on the right-of-way and station grounds those premises could not be used for agricultural purposes, except those station grounds that were right on to the rock; that sections 27 and 31 can be used for agricultural purposes but that the track section does not have any soil to amount to anything. (R. 191).

Pilcher, the agent of the Rock Island, testified he knows of no reason why the land of that road could not be used for agricultural purposes were it not covered with railroad tracks; that it has agricultural land as a basis. (R. 183).

Next it is alleged that the work done was not done to bring about the drainage of agricultural lands. (O. 8, 9; M. 8, 9). Denials (M. 30; O. 30). It was further alleged the new ditches were not needed to drain agricultural lands because the old ditches had sufficient capacity for that purpose. (M. 7; O. 7). Denials (M. 28; O. 28).

But there is much testimony that the railroad company appellees have no agricultural lands within the district and nothing but property which is used exclusively for railroad purposes. (Omaha, R. 167; Rock Island, R. 177, 182, 183, 196; Milwaukee, R. 196; Great Northern, R. 184). This, though it is testified that these companies had approximately 340 acres of agricultural land as defined in *Milne vs. McKinnon*, 32 S. D. 627, within the drainage area, which is subject to assessment as such, viz rights-of-way, station grounds, parks, pumping stations, streets, and power plant. (M. 271, 276, 286, 295, 303; R. 196).

As to the Power Company it is testified that all the

land it owns can be described as a large pile of stone here and there in topsy turvy condition and that there is not soil sufficient to be used for cultivation of crops. (M. 246). And that the property north from the dam to the hydro-electric plant is mostly granite. (M. 244, 245).

As to the City — One witness says Phillips Park cannot so be used; that neither the land in Phillips Park or Sherman Park can be used for agricultural purposes. (R. 183).

Hardimon adds that no part of Sherman Park is agricultural land and that Phillips Park is not — is quite broken and is not used for agricultural purposes. (R. 200). Charnock testifies to his belief that Sherman Park "was run in by the acre somewhere near like agricultural land"; that the streets were assessed about the same as the property where the streets were located; that he did not call city lots agricultural lands, though they were assessed as such. (R. 234, 235).

One witness who had testified that the parks were not agricultural lands (Spellerberg) testified also that an acre and a half or two in Phillips Park can be tilled or turned into pasture and made to produce after a fashion, but that one would have to wait until after the flood had gone and that it was a late crop proposition (R. 184), that there are fifty-two or fifty-three acres in Sherman Park of which about twenty or twenty-five acres are on the lower level, and if this land were not used for park purposes it would not make good pasture because there is not enough grass; that while some land around there is used for pasture it is higher than the park land, and while it is true that the land north of the park is used somewhat for cultivation of crops, it was taking chances. (R. 185).

It was admitted in answer that the property of the plaintiffs was not being used for agricultural purposes and that it was the kind of property described in the bill, e. g., right-of-way, railroad tracks, the power plant

to generate electric current, and city parks. (P. 29; R. 29; M. 38; O. 38; S. 27; N. 28).

Upon this it is contended (R. 14, and M. 15), that the Constitution of South Dakota gives no authority to provide any drainage except for the drainage of agricultural lands.

In the opinion of the trial Judge it is said:

"These plaintiffs were not attempted to be assessed in any manner contemplated by the statute, for the payment of the costs of draining agricultural lands". (M. 91).

"The Constitution provides that the drainage of agricultural lands is especially declared to be a public purpose and the legislature may provide therefor, and may provide for the organization of drainage districts for the drainage of lands for any public use, and may vest in the corporate authority of counties, townships, and municipalities, the power to make special assessments upon the property benefited thereby according to the benefits received".

"Pursuant to this provision of the Constitution the Legislature has provided for the drainage of agricultural lands, but nowhere is there any statutory enactment under which drainage districts may be formed for the drainage of land 'for any public use'." (M. 79).

"It may be said that to remedy these wrongs constituted a public use, as referred to in the Constitution of the State. Admitting that that is true, we are confronted with the proposition that there has been no legislation conforming with the provisions of the Constitution, authorizing the legislature to provide for the establishment of drainage ditch districts, and the naming of officers with the

powers therein referred to. If, therefore, any claim were made that the commissioners were acting under this authority, independent of the provisions of law with reference to the drainage of agricultural lands, the answer is that the provision of the Constitution is not self-executing, and that no legislation has been provided carrying this provision of the Constitution into effect". (M. 93, 94).

While we concede that if the District Court had jurisdiction at all it could pass upon the question here presented though same is not a federal question, we contend that the lower courts have at this point misconceived what the provisions of the South Dakota Constitution and statutes are, and, passing that, it has been determined by the highest court of the State in the case of *Gilseth*, 46 S. D. 374, that the very project at bar was authorized by the Constitution and laws of the State.

The Circuit Court of Appeals puts it thus:

"We are satisfied that under Section Six, Article Twenty-one, of the South Dakota Constitution, drainage of lands for any public use other than the drainage of agricultural lands, must be carried out by drainage districts, and no legislation at the time of these proceedings had been provided for the establishment of such drainage districts. Which ever way, therefore, the matter is viewed, the board was acting without legal authority in its apportionment of benefits and threatened assessment of taxes". (R. 257).

In other words, the only authority the board has is to establish drainage districts to provide drainage which constitutes a public use provided that that public use consists of drainage agricultural lands.

THE PREMATUREITY OF THE SUIT.

The record shows without dispute that the statute requires, first, a tentative apportionment of benefits, and then provides for a hearing at which this tentative assessment may be equalized, i. e., raised or lowered. Despite this the Circuit Court of Appeals ruled that though suit was brought before any equalization as to the benefits apportioned to these plaintiffs was had, it was not premature (R. 263); ruled that though when the suits were brought it was not known what the final proportion of benefits would be, that these suits were not premature because it was definitely known what the total expenditure was, wherefore, it was merely a deduction in mathematics to arrive at the assessment that threatened each appellee. (R. 262). The opinion of the District Judge declares that under Section 8463 the apportionment takes place before it is known what will be the actual amount of money expended and then holds that suits brought at that stage were not premature. (M. 78). Though there cannot be a final assessment until after the construction of the project has been completed, and though these suits were brought before its completion and, therefore, before any assessment could be or was made, yet the district court ruled that these suits were not premature. (M. 78, 81). Though no assessment could be spread by the auditor until the benefits were finally fixed and though there was not even an assessment to be spread when these suits were brought, still the District Court ruled that they were not prematurely brought. (M. 78). These suits which were held to be not prematurely brought, were instituted before any tax had been levied and, therefore, of course before it became effective or there was any attempt to enforce it. (M. 80, 81).

AS TO PROPERTY NOT BEING INCLUDED IN THE AREA OF
THE NEW DRAINAGE DISTRICT.

There is allegation that nothing described in the notice given was included in the property assessed for the construction of the new drainage ditch. (R. 6; P. 6; N. 6); Denials (N. 26, 27; P. 28; O. 27; S. 26; M. 26). Alleged, that no property of the plaintiffs is within the area of the new drainage district. (N. 6; P. 6). Denials (N. 26, 27, 28; P. 28). Further, that, at all events, the board had no power or jurisdiction to include any of the property of plaintiffs within said drainage district. (M. 6; P. 3). Denials (N. 26, 27, 28; P. 28, 29).

As to the allegations of fact, there was no evidence to sustain them. On the contrary the Blackman petition and original notice published, describe the appellees property within the drainage district in the same manner as all other property included therein. (R. 47-70, 59-89). As to the allegation that power to include was lacking, that is answered by the law, and by the holding of the Gilseth case which is binding on this court. And here again, it is not amiss to add that the point is not available in this suit because the plaintiffs had opportunity to have this corrected in the tribunals provided by the statutes for that purpose.

ALLEGED FAILURE TO COMPLY WITH THE STATUTE.

Many such failures are put in issue. Before entering upon presenting these, it is proper to repeat that the Gilseth case has bindingly determined that the statutes were so substantially followed as that the board acquired jurisdiction. This determines that none of these complaints are well taken. Moreover, jurisdiction having been acquired, the omission to present these complaints to the proper tribunals provided by statute foreclosed the right to now urge them in this collateral attack.

In view of what has just been said, we will not undertake to particularize as to each and every one of these numerous attacks. But will select a few that are typical.

It is complained that a number of things were not effected by means of the adoption of resolutions. One of these is that there was no such resolution with reference to the proceedings initiated by the petition upon which the project is founded. (M. 56, 57). It appears that Exhibit "16" is a resolution adopted for that very purpose. (M. 320; R. 212; O. 200; N. 257; S. 248; P. 260). Though it was denied, resolution was adopted establishing the new drainage project. (M. 323, 324; R. 215, 216; O. 203, 204; N. 260, 261; S. 251, 252; P. 263, 264) — indeed, the Circuit Court of Appeals so found. (R. 250, 251). Though it is denied, the Circuit Court of Appeals finds that there was resolution adopted after the surveyor's report was filed to fix the line and width of the proposed ditch. (R. 250, 251). And there *was* resolution adopted fixing the exact line and width of the ditch and the time and place for hearing the petition. (M. 57, 58). There *was* resolution adopted for straightening the ditch and straightening the river cut-offs. (M. 327, 328, 331; R. 219, 223; O. 207, 211; N. 264, 267; S. 255, 258; P. 267, 271).

There *was* order that the Backman petition be filed and that a copy of it be transmitted to the state engineer; and it was filed in the office of the auditor on August 3rd, 1916. (M. 50, 56; R. 42, 48; O. 42, 48;

N. 42, 47; S. 41, 46; P. 43, 49).

There *was* surveyor's report made under direction of the state engineer. (R. 212; O. 200; N. 257; S. 248; P. 260). The Circuit Court of Appeals found that report of survey was made and filed by the engineer in charge. (R. 250, 251). The survey *was* ordered and made. Some of the bills themselves so allege. (S. 11; N. 12; R. 12; M. 12, 13).

The Circuit Court of Appeals found the Blackman petition was transmitted to the state engineer and that thereupon a survey was ordered (R. 250); and the letter of transmittal is found on. (R. 212; O. 200; N. 256; S. 248; P. 259).

There *was* inspection by both the board and the state engineer. (R. 162, 238). The resolution on which it was done is found on (M. 57; R. 49; O. 49; N. 49; S. 48; P. 50).

AS TO THE COMPLAINT OF BUILDING WITHOUT COMPETITIVE
BIDS.

It suffices to say that as to this the statute was followed. Bids were received. But the statute authorized rejecting all of them and proceeding to construct under the supervision of the board and on contract on its part. The bids were rejected and the work was performed under a cost plus contract. Aside from this last fact there is not even a hint that rejecting the bids and proceeding to build for itself was even improvident, to say nothing of fraudulent or improper.

THE CLAIM OF ARBITRARY ACTION.

It has already been pointed out to be the settled law of this case that there has been no infraction of the federal Constitution. What the Circuit Court of Appeals rules is that there was conduct so arbitrary as to invalidate the proceedings, without reference to any constitutional aspect.

Roughly, what the appellees contend is that the arbitrary conduct consists (a) of discriminating against appellees in favor of the owners of agricultural land within the drainage district area; (b) that the apportionment of benefits as a whole and as to all affected by the drainage project was by an unreasonable method and without any rational basis; (c) that in truth no benefits accrued to these appellees from the proposed drainage project — at any rate, greatly less than the amounts they were threatened with assessment for.

We think it proper to say again, that if all these contentions were well made appellees cannot be heard upon them in this collateral suit; that these were all matters to be presented to the board and if necessary on appeal from its refusal to give relief asked. — That, so,

appellees are now foreclosed to raise these points.

SPEAKING, FIRST TO THE ALLEGED DISCRIMINATION.

It was ruled below that the method of apportioning benefits was an arbitrary method, that the standard of appropotional assessment adopted could not obtain even approximately correct general results, and that there was discrimination as between these plaintiffs and property owners who were to be assessed for the drainage of agricultural lands. (M. 84, 90, 91, 92). Until the argument *in extenso* is reached it would serve no useful purpose to elaborate beyond this statement, and so of the testimony on the point. It must suffice at this stage to point out types.

Rettinghouse, the engineer of the board, testified that in reducing the valuation down proportionately the method was alike in dealing with railroad or ranch property and that no discrimination would appear after the equalization. (R. 242).

Defendant Risty, that the board compared the benefits arrived at as to the Power Company and dealt with it on the unit basis of the benefit to the one acre tract of agricultural land, the acre that had been selected as the unit. (R. 257).

Risty says the board used this \$25.00, the actual benefit to the unit, in determining the apportionment of benefits which each of the various classes of lands aside from farm lands should be assessed, and did this in regard to farm land (R. 166); that as to comparing the alleged benefits to railroads to the unit, he does not remember what value the board placed on it, that they had the value of agricultural unit fixed and also the apportionment of benefits (R. 154); that in all cases the board tried to take into consideration the right of way, the value of the lands as compared with adjacent lands, and the benefits that might be derived from the drainage project as to the maintenance of tracks and

bridges and so on (R. 153); that in dealing, throughout, the method was to ascertain what in the judgment of the board was the benefit which it thought was right and proper. Then it divided by the benefit to the agricultural unit to get the number of units apportioned to the City, and based its judgment in part on the fact that most of the members were farmers and knew the price land was selling at. (R. 255).

Charnock says the board placed a value on the land selected as a unit without the ditch and another with the ditch, and in its judgment found the difference to be \$25.00 and applied that unit to all the lands and used the same method of determining the number of units of benefit to all of the lands affected (R. 232); — that the same process was used on all property taken. (R. 233).

It appears most clearly that in all it did, the Board exercised its honest judgment and made necessary investigation — that if there is any criticism to be made it could not be more than that there was honest mistake in judgment. (R. 233, 234, 255, 256, 258).

AS TO DISCRIMINATION IN FAVOR OF AGRICULTURAL LANDS.

Rettinghouse testifies that lands were assessed on the basis of 30 or 40 out of a hundred depending on the amount of the benefits received taking the unit as one hundred, and there were lands assessed as high as three hundred and three hundred fifty. (R. 259).

Risty says that as to the manner of determining the benefit of the unit of agricultural land the board made an estimate of what that land was in its judgment worth and how much more it would be worth after the benefit of the ditch (R. 255); that the engineer spread the amount the Milwaukee would be benefited on the same basis as the farm land adjacent. (R. 163).

Charnock says the agricultural land had a value placed on computation by the acre (R. 233), that the engineer showed the board what the benefit would come to in money and thus the \$25.00 benefit unit as to farms was arrived at. (R. 234).

Rettinghouse says that as to the Milwaukee there was considered its right of way, on the acreage basis, which was estimated in proportion to the adjacent land. Charnock, that in applying the unit to the Milwaukee, the board first considered the acreage belonging to it and assessed that practically the same as abutting lands. (R. 232).

Risty says that when the railroad property and other properties were reached, the board considered the benefits they would derive annually and capitalized that. On considering how much the average annual benefit would be to these properties, say a certain piece of railroad, and having that amount fixed it took the benefit which this unit of farm is supposed to receive and divided the benefits of the railroads thereby. To illustrate, if the benefit to the unit of farm land was twenty-five dollars, the board would make the apportionment of benefits 25 per cent. When it came to placing the unit on other property it, after exercising its judgment and making necessary investigation, arrived at a certain amount. It divided that by 25, the benefit to the farm unit, and that gave the number of units for assessment. (M. 256).

AS TO DISCRIMINATION AGAINST THE CITY.

Charnock testified that as he remembers it the streets of the City were taken at about the same value as the property abutting, though the lots were not figured by the acre and the City was not dealt with on the acreage basis (R. 234), — and that no difference was made resting on whether the property belonged to the City or to individuals (R. 233); that the streets were assessed along about the same as the property where the streets were located, and that one would not call city lots agricultural land. The streets were not assessed as agricultural land. (R. 235).

One of the defendants said only the north end of Phillips park was taken in and it was assessed the same as was all the City property or any of the property. (R. 235).

Risty said for one thing that in comparing the benefits to the property of the City with agricultural units, the board took into consideration the public highways that would be annually overflowed and proceeded as in all other cases. That in all cases the board tried to take into consideration the right of way and the value of lands as compared with adjacent lands (R. 153); — that in comparing the benefits of the property of the City with agricultural units the board took into consideration the public highways that would be annually overflowed, had in mind as road builders what damage that would do to such roads and in its judgment fixed the damages to be what it thought was right, and thus fixed a number of units on a piece of property and then proceeded in like manner as to all other cases (R. 256); that the board compared the apportionment as to parks, water systems, streets, and highways, with the agricultural unit (R. 256); and that with reference to parks, water systems, highways, and streets, in the city, the board based its determination on the same facts used with reference to all other property, and estimated according to its judgment and based its action on an investigation of the benefits to the public and the loss

there would be if the foregoing things in the city were annually overflowed. (R. 255).

THE CLAIM OF ARBITRARY ACTION.

The basis for asserting that the action of the board was arbitrary seems to be, first, that the proportion of units out of the total of 32,549.62, tentatively fixed, was:

Chicago, Rock Island & Pacific Rail- way Co.,	839.45
Chicago, Rock Island & Pacific Rail- way Co.	1681.
Chicago, St. Paul, Minneapolis & Omaha Railway Co.	839.45
Northern States Power Co.	5351.63
Great Northern Railway	613.85
City of Sioux Falls	3147.95 (R. 251)

Related, the tentative proposed assessment, in dollars and cents, to-wit:

Great Northern,	\$ 5,800.00	(13)
Power Company,	51,000.00	(13)
Rock Island,	4,974.00	(13)
City of Sioux Falls,	29,905.52	(12)
Omaha,	7,500.00	(13)
Milwaukee,	15,000.00	(13)

The same subject is attempted to be covered by testimony, say, that the Rock Island owns a little less than thirty acres in a drainage district designed to drain upwards of 20,000 acres of agricultural land (R. 6-177); and, say, that the Milwaukee owned nothing but its right-of-way.

Those who helped make and did make the proportional assessment became witnesses:

Risty testified that while it might seem arbitrary, say as to county highways, the board knew pretty well what it would take to keep such roads in good passable condition, both when there was no overflow and in sea-

sons when there was (R. 258). It is pointed out that the appellees at no time appeared before the board and thus it was denied making what might have been deemed a more satisfactory appraisement. Risty testifies it was the judgment of the Board that the real benefit to lands should be computed on the basis of a profit unit and that when this was determined it proceeded to equalize and fix the proportion of benefits among the other property. (R. 262). To show how much it all was all a matter of judgment and opinion, Risty illustrates with the case where a basement is filled with water and says that it might well be that the estimate by the board would vary from one made by the owner, and that neither might be right. (R. 256). He says the board made an estimate of damages that might accrue to highways and streets overflowed and based its estimate on its best judgment. (R. 256).

DISCRIMINATION CONCERNING THE RAILROADS.

Risty testified on cross examination by the appellees that as to the Rock Island, Omaha, Great Northern, Milwaukee, the City of Sioux Falls and the Power Company the board took into consideration the value of the right-of-way, compared the right-of-way with adjacent lands and considered what protection from water would benefit these properties and the saving it would be in the upkeep of the railroad track, bridges, etc. (R. 256, 257).

Charnock testified that in assessing the railroads the board considered the land owned by them, the railroad itself and the culverts and the bridges (R. 233); and in applying the unit to the Milwaukee there was first considered the acreage belonging to it, and that was assessed practically the same as abutting lands. (R. 232). It is testified that with reference to the Milwaukee in fixing its proportion to be 1678 units the board took into consideration what it would damage these tracks if washed out and the expense of rebuilding; the board assumed that were it not for the spillway those tracks would wash out and be under water for a certain period;

that witness himself had seen that railroad under water for eight or ten days and compelled to turn trains around and run them over other railroads; that these tracks were on lands subject to overflow, and that in this connection the board considered the distance the Milwaukee property was from land that had overflowed; that in this territory floods occurred often. It was testified further that the personal experience of the engineer of the board gave him a very good idea of what the cost periodically would be for washouts and his estimate was as close as possible as to what would be saved if there were none, and this was capitalized. (R. 160).

As to the Rock Island, Risty says the board considered in the apportionment the damages that might be done to its tracks, grades by high water. (R. 258).

Charnock says the board took into consideration the benefits to the grades of the Milwaukee, the culverts that could be done away with and bridges that could be abandoned or shortened by reason of the drainage system. (R. 232). Risty says, that the board considered the bridges of the Milwaukee in arriving at its benefits. (R. 260).

The engineer of the board testifies that the Great Northern had 2.4 acres of right-of-way which the board considered benefitted; also a one-fifth of a mile of track, two bridges that would be protected and approximately 315 feet of bridge that might be abandoned. (R. 241).

As to the Omaha he says it had two and one-fourth miles of track 27 acres of right-of-way, two bridges that might be protected, and 405 lineal feet of bridges that might be abandoned by reason of the drainage project (R. 242); that the Milwaukee has 170 acres of right-of-way, 14.2 miles of track, two bridges that would be protected, one bridge that might be shortened one hundred feet, and another bridge 176 feet long that might be abandoned. (R. 241). Risty says, that there was a certain number of bridges on the Omaha that were protected by the drainage. (R. 263). According to Char-

nock the board considered how many bridges could be saved by the diversion of the water. (R. 233). Engineer Rettinghouse, testified as to Bridge P. 129 on the Omaha the Bridge P. 130 which were west of the city and east of the river, that he believed the drainage project would enable the company to abandon these bridges (O. 233); that on the Rock Island there were two bridges, which could be shortened 230 feet, that on the bridge south-west of town there could be a shortening of 120 feet, and the one in town could be shortened 110 feet, taking out one span. (R. 242). Risty testified that it was considered the bridge could be built smaller and that grades could be substituted for trestles. (R. 258). Rettinghouse, that the board considered the benefit to bridges, the possible shortening of same and the betterment or saving in the maintenance of the road bed. (R. 162).

On the other hand, Basset testified there would be no benefits from shortening bridges because the same openings would have to be left, and, therefore, whenever the Great Northern planned to shorten a bridge it did not take into consideration the existence of a drainage ditch. (R. 189).

Barlow says that if the evidence did disclose that from one-third to one-half of the water that comes down the river was diverted, yet it would not be a reasonable conclusion that at least part of the bridges could be done away with. (R. 170). Waite, if the bridge in the city were eliminated or shortened and a span taken out leaving the bridge 197 feet it would be something he would not dare to do (R. 178); that he would not consider it was reasonable engineering to eliminate any of this bridge (R. 179); and that he was willing to say this, though he has no information as to how much water the river carries, the slope of the land or the difference in its height. (R. 179). Hardimon, testified that in his judgment it would be unsafe to change the length of the railroad or other bridges in town. (R. 203). Bassett, that it would not be good engineering or safe to shorten the bridge which is now 615 feet long by more than 50

feet, under any conditions. (R. 190). Perkins, testifies the span could not be safely shortened, which he bases on the fact that he has had to enlarge openings several times (R. 182); but Barlow concedes that a former chief engineer of the Omaha did at one time consider the shortening of the bridge just east of the city. (R. 170).

The assessment was proceeded with under the advice of the engineer. Charnock says, the engineer figured the benefit to the road bed, culverts and the land owned by the railroads (R. 234); that all the various elements that the engineer had suggested as to the Milwaukee were taken into consideration in fixing the benefits as to that railroad (R. 163); that the engineer figured out for the board the saving to the bridges. (R. 234). The engineer advised the board that certain of the bridges could be shortened by having the water by-passed through the ditch (R. 162); and Risty says the board took into consideration that the Rock Island might build a shorter bridge. (R. 258).

AS TO THE POWER COMPANY.

Charnock says that in dealing with the Power Company there was considered the dam at Schodjt's which the board had put in to control the river water and also the gates or wiers at Thompson's, and cut-offs. (R. 232, 233). Risty, as to the plant the board considered the overflow at high water that would clog up the turbines and put them out of working order for a time, and the board had in mind the overflow in 1881 which spread out over the lumber yards in the territory of the Power Plant and took out a mill at the foot of the falls (R. 264); that there was considered several river cut-offs which had been put in in the river north of the city, and in determining the benefit to the power company there was considered the effect and influence of these cut-offs in hastening the water and shortening the time of floodage as to the Power Plant (R. 264); that the board considered high water backing up and filling up the gorge below the plant which resulted at certain

times the water power would not be serviceable and that it would cost more for fuel and other items (R. 259) — that the Power Company would be given a uniform flow in dry seasons and be protected at overflow seasons. (R. 159).

AS TO THE CITY.

Risty says that as to the streets and basements that flooded each year an estimate was made on how much it would damage a basement to have it filled with water (R. 158); that in dealing with streets and basements flooded yearly the board made an estimate as to how much it would damage the basement if filled with water (R. 158); and so of streets and parks. (R. 158). He again points out that all this might have been better adjusted if the assessed parties had ever come to a hearing. (R. 158). It was testified the board considered that one benefit to the city was keeping the water off and thus benefitting streets as well as abutting property. (R. 234). It was figured that if the water was kept off the road this made a benefit in so many dollars — and this was the basis of dealing with streets; they were not dealt with on the acre basis but on lot valuation. (R. 134).

Risty says that with reference to parks, water systems, highways and streets in the city, the board based its determination on the same facts it used with reference to all other property and estimated according to its judgment and on investigation of the benefits to the public and the loss it would suffer to highways, streets, parks and water systems suffered from annual overflow. (R. 155, 156).

AS TO THE UNIT METHOD.

The engineer of the board says that in arriving at the benefits to highways there was considered that a certain amount of annual maintenance was required and that it was greater under flood conditions; that the difference in the estimated cost of maintenance would capitalize to represent the benefit in a certain sum and the result was considered a real benefit, and after obtaining this result and making a great many calculations the board took into consideration the various locations and thus it was determined that some were benefitted more than others.

The board decided on its inspection trip with the engineer to select as a unit tract of land lying about three miles north of the city and between the river and the ditch (R. 232); that in going over the territory he fixed on the location of a local particular unit as illustrative as could be found and therefore recommended the above unit. (R. 238). One member of the board testifies this unit was one acre of agricultural land. (R. 233). It was decided on the inspection trip that the acre adopted as a unit was worth \$100. before the improvement and would be worth \$125.00 afterwards. (R. 238, 239). The board determined that in its judgment this unit was benefitted twenty-five per cent or twenty-five dollars. (R. 162). After determining the value of this unit as aforesaid the board proceeded to equalize and fix the proportion of benefits among the other properties. (R. 162).

AS TO BENEFITS.

Risty testified that the Milwaukee extended almost the full length of the ditch and was adjacent to it; that in some places its track was right along the ditch and in others it runs pretty close, possible eighty rods distant where the ditch crosses the river at Renner. (R. 163). Nelson, that there was a place on the section of which he was foreman where the ditch is just outside of the Milwaukee right-of-way and he thinks it was diked four feet just outside of the right-of-way (R. 192); that from a point about four miles south of Baltic the ditch is on the west side of the Milwaukee and from that point down to Renner it runs close to the track, between the railroad and the river, both ditch and river being on the west side of the track. (R. 192). Bassett, that the Great Northern enters the city of Sioux Falls at a point about a mile and one-half from the mouth of the spillway. (R. 184).

Risty says the engineer explained to the board that the embankments, tracks and road beds of the Milwaukee were benefitted by being made more substantial and requiring less upkeep. (R. 163). Rettinghouse, that from his experience as a railroad engineer and the facts and data he has been able to gather, the benefits are direct benefit to the railroad company and their properties (R. 242); and so as to the Power Company. (R. 242). One thing the engineer advised the board was that some of of the bridges would be protected. (R. 162).

The engineer says that one element of benefit was the straightening of the river to a large extent between the upper end of the section clear down to a point near the Great Northern tracks and that this greatly increased the velocity of the water flowing through the river, thereby shortening the flood period. (R. 221).

Nelson says the flood in 1897 covered all the east side of the Milwaukee track and went through the track (R. 193); that in the flood of 1916 the flood water washed out a part of the track but not at the place where

the bridge is. (R. 193).

The engineer testifies that before this improvement was constructed the wells in the city were flooded by surface water and made unsanitary; witness recollects that notice was sent out that water should be boiled because not suitable for drinking, while another was sent out by the health officers that the water was perfectly sanitary and healthy. (R. 279, 280).

Hardimon admits Sherman park overflows pretty near every year. (R. 200). He says the city owns this park and it is kept for park purposes but it practically overflows every spring and that the water does not need to rise but a little, because the land is very low and the river forms a letter "S" just around it (R. 202); that possibly anything that tends to divert a portion of the water coming down the Sioux Valley and keeps it out of the river as it goes down the valley and as the river goes through Sherman Park would be a benefit to that park (R. 202); that another item considered was the benefit to the city water works (R. 243); that during flood conditions these works were out of commission and the board estimated that this was so a certain number of days in each year. (R. 242).

He says that it was taken into consideration that the city had about fourteen miles of streets and the benefits that would accrue to those and as well to county and town roads. (R. 242). He testified the river runs around the city some miles beyond the outlet of the spillway and it was a direct benefit and the same benefit that was received by lands further up the river to bypass this water on adjacent lands, starting at the north end of the city limits and around the city and going on until the ditch dumps the water back into the river (R. 242, 243), — and that from the diversion of the flood waters the annual maintenance of parks would be reduced. (R. 242).

Bassett testified for plaintiffs that on the Watertown and Sioux Falls line, a part of the Great Northern

system, they are flooded just south of the City pumping plant and at the top of the hill, that there the water comes out of a ditch and comes over the track and has done so every year since witness has been in Sioux Falls. This water gets to be probably six inches over the top of the track and stands in there sometimes for probably ten days. (R. 190).

The witness Nelson says that in 1916 at a point four miles south of Baltic the dam went out of the river and the river let the water in the ditch; that the ditch couldn't carry it and it went over the bank and washed out the dike; that a few miles further south it washed the track and let all the water out over the farms around, flooded them, and then washed back on the track; this water came from the ditch; the ditch is constructed with a dike and the water broke through the dike. The water that came into the ditch from the river went out and washed all the tracks as well as flooded the ground. (R. 192).

Knodt says there was a flood in 1897 that stopped taking trains out because the tracks were damaged on the west Sioux river bottom, just west of the city so that they could not cross; that the water was up to the rails most all the way on that side of the river; that there was one place in the road bed where an opening had washed out and the ties were hanging on the rails, a few ties were gone and it was quite difficult even to walk across; that there were two smaller bridges where the road bed was washed out, and ties hanging on the rails and that the track remained impassable for trains for ten days or two weeks. (M. 339).

At times water has been high enough around the penitentiary, where the Great Northern track runs, to flood this track some inches of water every year. (R. 192).

And Nelson says the points at which the ditch protects the Milwaukee track is about a half a mile south of Thompson's bridge, that the ditch comes to the right-

of-way at this bridge and runs nearly four miles down the track and the water comes into the ditch where this bridge is built. (R. 193).

There are many allegations, in effect, that the project did more harm than good (R. 9; N. 8; S. 8, 9; P. 9; M. 8; O. 8), and issue was joined on these in answer (S. 8, Denial 27; P. 8, Denial 29; O. 14, Denial 38).

The trial Court found that as a matter of fact no direct benefits to the property of the railroads within the City are shown. (M. 90, 91).

One witness considers there is great danger that the spillway as now constructed will work that the ditch must be closed and the water turned back into the original channel (R. 189); and Nelson says that if the dikes were raised a foot or so they would keep more water in than they do now. (R. 193).

Another witness says that since the construction he has lost more crops than he did before, and that his losses have been considerably more, since. (R. 204).

The City has practically abandoned Lien's Park as a Park since the spillway was built, though before the building of it the City had started to improve this Park, on account of flood conditions when the river overflowed from the spilway. (R. 183. And Hardimon speaks practically to the same effect. (R. 201).

In the opinion of Bassett, no benefit has resulted to the right-of-way, tracks, bridges, embankment and station grounds from the construction of the drainage project including the spillway. (R. 189). In the judgment of Link the Power Company would absolutely not be justified to expend any money for the ditch and spillway on the basis of benefits to the plant, and in his opinion there is no appreciable benefit to the plant. (R. 206).

Lots 5 and 9, inclusive, in block 25, of Phillips's

addition is used by the Rock Island for round house, and turntable, and this property is on the west bank of the river, eighteen or twenty feet above the surface of the water. (R. 196). Hardimon says that as you leave Sherman Park the most of the shore line is fairly level on one side but the other was higher and goes farther from the river and for several miles there was a high plain on the right hand side as you go down the river and the banks on the left side are fairly high in places. (R. 199). Spellerberg testified the high water does not affect Phillip's Park to amount to anything, that the Park is practically on high ground except a small flat area at one end at which point the ditch overflows and comes down to Covell's Lake. One witness admits that while at one point near the Great Northern bridge in the City of Sioux Falls, the banks of the river are well defined, that as the river goes through the town confined in a deep channel there is a greater chance of danger; that the channel is widened and banks not so steep. (R. 184). One witness says the tracks were on an elevation above high water mark. (R. 189). Another speaks to like effect concerning banks and embankments and tracks. (R. 177, 189, 191). At one point twenty feet, and about eight feet above level of Cherry Rock. (R. 183).

Link says the Power plant was designed to take care of maximum flood conditions and designed and constructed before the drainage ditch was, and it was built to take care of any flood condition, regardless of any drainage (O. 196); even against a flood as severe as the one of 1881. (R. 297, 298; R. 205, 206).

Holt testified that as against a flood "this ditch would be simply a wrinkle in the valley", that the ditch is useless against floods because when flood waters were highest they would cover up the ditch. (R. 198). And Link says it is his opinion that this ditch and spillway should not be taken into consideration at all as a means of resisting possible floods. (R. 208). But he concedes the improvement relieves flood water conditions to a certain small extent in certain stages of the river. (R.

207).

According to Reed, the Power Company plant was carefully designed to preserve the property against flood water of the Sioux River. (N. 244, 245). Another witness, speaking generally, testifies that in locating a line of railroad through the Sioux River valley the engineer would necessarily have in mind as one element of the cost of construction the making of embankment high enough to be safe from flood waters. (R. 197). And Nelson that the Milwaukee protected itself by putting in rip rap. (R. 193).

Holt says that in making the location it is part of the duty of the engineer to find the height of the flood waters of the various streams he crosses, and the grade line is usually established with reference to high water; he gets as much information as he can in regard to the elevation that the high water reaches in the valley, gets this partly from those who live there and partly from his observation of the high water marks; he then determines the height of the grade from experience as indicated by such information. (R. 196, 197).

Thompson says there was nothing that prevented all of the water that was gathered by these ditches 1 and 2 at the outlet or spillway from going over the hill. (R. 204). Geelan, that he cannot say there is any particular noticeable difference in regard to the water conditions at the bridge in the city of Sioux Falls before and after the construction of the new spillway. (R. 172).

One witness thinks the ditch had no effect. (R. 180). Another, that it does not drain "this section down here", at all. (R. 207). Still another says that matters are the same as they were before — that water has come out of the ditch every year since the spillway was put in, and that at a level side of the Great Northern the water has come out over its tracks through the dikes and the ditch; and at the City pumping plant. (R. 191). Still another says that it has made no appreciable difference in the flow of the river. (R. 192). Still an-

other, that there is no apparent difference as regards to flood waters of the river with reference to the line of the Omaha west of the City and east of the river, very little noticeable difference in water conditions along the Omaha line — and while he declines to say there has been more water in the bottoms west of the City and north of the Omaha track than there was before, to his knowledge, there is fully as much. (R. 172).

One witness gives it as his understanding that the construction of this project has worked no decrease in the section force employed which he says would be the determining factor in the saving of maintenance account. (R. 171).

There was a flood in 1916 but as against 10,000 per second feet in 1881 the water that came down the river in 1916 did not exceed 6,000 or 6,500 cubic feet per second. (R. 206, 207). But Nelson testified that in 1916 the old spillway went out and there was high water. (R. 193). Spellerberg, that in 1919 and 1920 the river came to the highest it had been to his knowledge and that the overflow condition continued longer than in any prior year. (R. 183).

The manager of the Power Company testified that the gorge north of the power house was full of water in 1919 and 1920. (M. 247).

Geelan says that the river never was any danger either before or after the construction of the spillway excepting in the year 1881, that that year an ice gorge formed in the southeastern part of the city and the gorge held the water back and when the gorge broke there was a flood which flooded the track of one of appellee's railroads about at the location where at present it has its station. (R. 172). Link, that in 1881 was probably the maximum as to floods and probably reached 10,000 feet a second (R. 206, 207); that he was up on the ground quite a number of times in 1920 and that then water was over the track of two railroads and there was a flood down almost to Russell street and from there

down to Covell's Lake (R. 200); that the water went over Minnesota Avenue although at this point not enough to amount to anything; it merely took a few loads of cinders to patch it up. (R. 200).

According to Nelson, the water in 1916 did not cover the abutting lands before going through the track and did not cover half as much ground as the one of 1897. (R. 193).

An agent of the Rock Island testified the river has never been out of its banks in the City since 1890. (R. 183).

Hardimon says the high water except that of '81 has done no damage to speak of that he knows of to City property (R. 200); that they have abandoned Lien's Park on account of the water which has practically cut out the park. It is a little north and east of the penitentiary and just a little west of the spillway (R. 202); that when this flood came through the city in 1881 it took all the bridges except one and swept the mills and the lumber yards on the east side, the only thing left on the east side was the Omaha railroad bridge; but that this flood was caused by the ice gorge. (R. 198). But none of Covell's Lake park was subject to overflow except a little piece which is by First Street bridge which he thinks would not cover more than one whole acre (R. 202); that in one place, except what was done by the flood of 1881, he knows of no damage to speak of done to City property. (R. 200). But he also testifies that the water around the City electric light plant and the pumping station was greater in 1920 than anywhere prior to that year except 1881 (R. 200); that during 1919 and 1920 the water in the river was the highest he can recall, and especially so around the city water plant and electric light plant, except 1881. (R. 203). He never saw the water on the west Sioux Falls road higher than in 1920 except in the flood of 1881. though at this point each street is two and one-half or three feet above natural ground; that in that year the water went up to First about where it would go over

and then the bridge carried it down. (R. 200).

Several witnesses say between them that neither track or embankment or bridges or right-of-way, have in the past been flooded, and that in the past these have not been troubled with high water. (R. 177, 191, 203). Some of these qualified it by saying that this is so far as they know. (R. 179, 180, 189, 194). Another qualifies by saying that if the water has ever crossed the right-of-way the witness does not remember it. (R. 180).

Olsen has worked for the Milwaukee continuously since 1887 and has noticed no injury to railroad property from being covered by water during that time, and there was no such covering in Sioux Falls. (R. 193).

Pilcher, the local agent for the Rock Island at Sioux Falls, says that the Rock Island had never been washed by the river; that its right-of-way never had any water standing on it from the Sioux River ever since witness came there, since 1890. (R. 182). Another witness testified no water has ever been on the embankment or right-of-way of the Rock Island, to his knowledge. (R. 182). Still another speaks to the same effect. (R. 181). Perkins testifies that from January 1st, 1913, to June 1st, 1920, there never was any high water that ever threatened to damage the two Rock Island bridges. (R. 182).

Nelson never saw any water standing in the ditch along the side track of the Milwaukee track, on the ice house side (R. 194); that while in 1919 and 1920, water came out of the ditch in several places there was not enough to hurt the track, that the water went up the track and came to its bottom but didn't cut in much or wash. And there was none on the east of the Milwaukee track. And it was not injured in 1920. R. 193).

Dean was here in the high water of 1911, and there was no damage done that he knows of. (R. 181). But he also says that if the water were increased fifty per cent he does not believe the bridges would stand it. (R. 181). Waite testifies that while he does not know what

would be the effect on the bridges in town if the water flowing down the river should be increased thirty to fifty per cent, he thinks that even then the bridge east of town would be all right, but is not sure about the one in town. (R. 179, 180; O. 280). And Holt, that if subsequent to the time he had a high water mark something was done to increase the spread of water at a certain point he would have to take that into consideration. (R. 198).

There is testimony that witnesses know of no damage being done by high water in a described addition of the City of Sioux Falls near the round house or east of it. (R. 194).

Woods is familiar with some of the lots involved which are near the railroad round house south and east of the town and now used for new yard tracks, he says the main line lies between the trackage of this yard and the river and these tracks are lower than the main track which was built in 1879. It has never been disturbed by high water. (R. 196).

Spellerberg testifies that only a very small part on one end of Phillip's park and about a half of Sherman's park and about one-half of Lien's park, situated a little east of the spillway, are affected by the high water. (O. 182, 183).

Shea says that after water goes over the Milwaukee tracks it would not take out the entire railroad bed, but just break through and make opening similar to what the company now has by means of arches and that this water going over the track would not necessarily take out the entire embankment; that usually it only cuts out a short piece, to the extent of what is necessary to carry the overflow from one side of the track to the other. (R. 195) — that on his experience and observation he thought the water standing along and against grades had no effect on their maintenance or on the stability of the track (R. 195); that even where the embankment is twenty years old or older no additional expense of up-

keep is occasioned by having water standing against it. (R. 195). Both the engineer, Rettinghouse, and Mr. Barlow, a witness for the defense, take issue on this, and the latter says that the water along an embankment which supports railroad tracks has a tendency to weaken that embankment and this necessarily requires a greater outlay to keep the bank in solid form, and that as a general proposition the more there is of the standing water the more of such effect it has. (R. 239, 240; R. 169, 170).

It is, however, also said that as to the Omaha embankment there would be no such effect because its embankment is very wide and deep, heavily overgrown with vegetation and sod and that in the vicinity of the river course where any washing has ever taken place there is thorough protection by rip rap. (R. 170, 171).

AS TO LACK OF BENEFIT TO THE POWER COMPANY.

Reed thinks the hydro-electric plant is about a half mile from the mouth of the spillway. (G. 245).

One witness says no part of the property owned by the Power Company has been flooded since 1900 and that at the time this ditch was first constructed no part of said property was flooded. (N. 244). Another says that during the flood of 1921 there was never a day that the Power Company did not go on as usual and during all that time it ran at full blast. (N. 246, 247).

Link prefaces all he says as to the Power Company lacking benefit, with "under present conditions". (P. 197, 198). On this premise he says that no diversion which would lower the flood level in the tail-race would increase either the capacity of the plant or the amount of power it could produce (P. 197, 198); that the generators could not pull any more load no matter what the wheels might or might not do because the generators have a fixed capacity which cannot be exceeded without burning them up. (R. 196). With said limitations he says no benefit arises to the plant from the diversion of

flood water from it. (R. 196).

Anderson says that the diversion of water by the drainage ditch is a benefit to the Power Company plant in that the arrangement of the turbine wheels in connection with the tail-race is such that the company gets the maximum benefit of the draft tubes or pipes at this stage in the tail-race, as exists in times other than flood times. (P. 295, 296). Rettinghouse testifies one element of benefit to the Power Company was that through the diversion of part of the waters through the ditch, estimated at some twenty-six hundred to three thousand feet a second, as against flood conditions running six to ten thousand feet per second, water was taken from the tail-race and the lowering the available head was avoided; in saying this witness is largely guided by a report of Link and on information and investigation by Shenehon who designed the spillway, and the lay of the land opposite the plant is such that all the flood water after passing over the dam must pass through the tail race. (R. 240, 241).

It is the opinion of Link that by-passing at a time of maximum flood would have no appreciable effect upon the "out put" of the plant and that operation could be maintained constantly. (P. 296, 297). He cannot see that the river or ditches would have any effect on the flow of the river to the Power Company plant at normal stages of the river, nor any effect from straightening. (P. 296, 297; R. 195). But Rettinghouse testifies that through the by-passing of the flood waters the Power Company would have a constant aggregate output of hydro-electric power, while, in other than flood seasons, the controlling works and dams would keep all the waters in the river that should be there and pass it to the Power Company's turbines, thus insuring a constant flow even at a low stage of the water in the river (R. 241); that the increased velocity of water flowing through the river produced by the straightening of the river, caused the total of water collected at the initial point of the cut-offs to hasten down the river past the Power Com-

pany plant. (R. 241).

Risty says several river cut-offs were put in the river north of the City, and in determining the benefit to the Power Company there was considered the effect and influence of these cut-offs in hastening the flood water and shortening the time of floodage on the power plant (R. 164); — and the board based the Power Company benefit, for one thing, on the fact that there was a stream to give a steady flow around the bend so that the water did not go over the spillway. (R. 159).

According to Link, all that had been done, including the controllers at Thompson bridge merely maintained the level of the water and would prevent the river water going into the ditch under a certain height, to-wit, when flood condition is reached, but all that this comes to is that it increased the head and so merely conserved water but without increasing the output — that all it came to was to conserve what the Power Company had a right to have — to give it the water which the ditch had taken away. (R. 250, 251).

Rettinghouse testified that his opinion as to benefits is based on the assumption that it is cheaper to produce current from a hydro-electric plant than from a steam plant and that therefore the company was benefited by the increased head. (N. 243). The manager of the Power Company says that when the water is low the company cannot put it over their turbines and must therefore produce it with steam; that there were times in the year when the water was not sufficient to produce current and it cost more to run by steam than by water as a motive power; that when the water has not sufficient capacity it is necessary for the company to have a steam plant to supply the demands of the city for current. (N. 246).

There was a plea of estoppel by way of affirmative allegation in each of the answers. (See O. 39; M. 44;

S. 39; N. 38; P. 39; R. 39). This affirmative plea was never met by a denial in pleading, if indeed met at all.

It is pleaded that stated things were done by the board, with notice to and actual knowledge, acquiescence, approval, and consent of the plaintiff City, its officers, agents, and servants, and of all others like situated; that appellees had during all the time the ditch, river cut-off, and spillway were being established, constructive notice and actual knowledge that payment was to be made by special assessment against the lands and properties of the plaintiffs affected thereby; that they had such notice and knowledge that there was no other provision or method of making such payment; that neither appellee took any steps to stop or prevent the establishment of or performing work upon said ditch, river cut-off, or spillway, or to stop the issuance of drainage warrants therefor, though they had actual notice and knowledge that these warrants were to be taken up and paid only by said special assessment; and that the appellees are now and since 1918 have been receiving large and continuous benefits to their lands and properties affected by reason of said reconstruction and construction of said drainage ditch, river cut-off, and spillway.

The things, the doing of which is so urged as an estoppel, were, among others, having knowledge that copy of the petition was transmitted to the state engineer; that there was inspection of the proposed route of the drainage project; that the board caused a survey to be made by a competent surveyor under the supervision of the state engineer; the making and filing of said report; the determination of the board of the exact length, line, and width, of said drainage improvements; the order and resolution of the board fixing time and place for hearing on the petition and the giving of notice as to such hearing; the establishment of the district by resolution and order upon said hearing; the giving of subsequent notice to all parties interested of the final establishment; having knowledge of all work done and performed on said ditches and river cut-offs, and of the

establishment and construction of said spillway.

It is averred that the City is estopped because it was one of the signers of the Blackman petition, the one upon which this improvement was constructed. (N. 39; M. 30, 31, 32, 33; O. 35).

The Rock Island delivered cement after there had been discussion whether the company was able to deliver freight to the place where the contract for the construction was being carried out. (R. 237). Boyce made arrangements with the officers or agents of the Milwaukee and of the Great Northern to have freight spotted or delivered at or near where the spillway was being constructed and several car loads of such freight were delivered near the spillway. (N. 275). He says he had certain steel reinforcing material delivered for the work. Some of it came in on the Milwaukee and some on the Great Northern. (N. 275). Some of the work was done with a machine shipped in over the Great Northern, and Larson arranged with the agent of the Great Northern to have it spotted. (R. 231). There was an arrangement with the Great Northern to deliver cement, the delivery to be made at the spillway. It was so delivered and the Great Northern was paid for the service. (R. 231). The Milwaukee delivered another machine and was paid for the freight. The ditch was about one thousand or fifteen hundred feet from the Milwaukee right-of-way. (R. 231). On arrangement with its local agent the supplies were to be or, perhaps, were delivered along its track at the Schodjt's dam. The witness Jensen had a talk with this agent about the ditch and told him the board needed some assistance at the ditch and along the river. (R. 279). The Milwaukee transported men to this work, on arrangement with its agent. The agent was told help was needed and permission was gotten to make it possible to stop between stations. For all this transportation, bills were rendered the board for the tickets and these were paid with county warrants. (R. 279, 280).

One defendant had a talk with the superintendent of the Milwaukee and the latter looked over the water situation because a lot of track had washed out north of the city and told witness the latter could get anything he wanted to help control this water. (R. 280).

Pilcher, who was working for the Rock Island railroad in 1916, 1917, and 1918, then knew about this new ditch going in, saw the publication in the newspapers and saw the spillway in the course of construction. (R. 183).

The assistant engineer of the Great Northern saw the repairing of the ditch and the throwing up of embankments. He saw them building the spillway in 1917 and has been watching it. (R. 191).

During the construction of the spillway in 1917 and 1918, the electrical power used in construction was furnished by the Power Company, and its agents made the connections. The company rendered statements from time to time, these were presented to the board and paid by warrants to the Power Company. (N. 276).

The manager of the Power Company asked permission of one of the defendant members of the board to put in a dam to keep the water from going into the river from the ditch. (R. 280). He asked this member if the Power Company could not put in a temporary dam at Schodjt's and keep the water there; said the Power Company was losing, and the board did put in such a dam. Later, the manager asked for a longer one, and in 1919 and 1920, the board put in a dam together with the Power Company, and its manager drove in piling with a pile driver he had, and the board furnished some planks. They got teams and scrapers afterwards and filled up the dam and made it about 60 feet on the bottom and 40 feet on the top. (R. 280).

The mayor of the City and the auditor on authority from the City were signers to the petition that initiated this very project. (R. 210, 211). The mayor attended one of the meetings when these proceedings were institut-

ed and knew of the building of the spillway. (S. 245). The City furnished water for the construction of the spillway and put in a meter, and all water bills presented were paid by the board by warrants. (N. 275). The City commission was present in the fall of 1917 when work was going on. (N. 276).

While the Circuit Court of Appeals quite fully sets out what estoppel the appellants pleaded and gives some space to mentioning what actually occurred, it does very little with the question of what the effect of those acts should be. One illustration is the statement that it is claimed the City is estopped because of the action of its mayor and auditor in signing the petition which initiated this project. (R. 264). — Nothing further is said on this specific head.

The issue of estoppel is disposed of, mainly, on the ground that the various appellees had no notice at the time the acts constituting the alleged estoppel occurred that appellees were to be affected by the drainage construction or be assessed for the cost thereof, and therefore, the claimed acts of agents and officers of appellees did not constitute an estoppel. (R. 264).

All else that is said is an attempted distinction between those whose property was and those whose property was not within the area of the old ditch project. It is not indicated how it matters that one who by acquiescence should be estopped is not just as much estopped though he did not have property in the area affected by the old ditches. (R. 264).

OBJECTION TO JURISDICTION.

It is submitted that the District Court in which these suits were brought lacked jurisdiction and that, therefore, this court should reverse and direct said Court to dismiss the suits.

This, on the following grounds:

(a). Five of the six appellees had diversity of citizenship, but the amount in controversy was not high enough to give jurisdiction on that head.

(b). All of the appellees raise constitutional questions and made attack on the ground that there had been violation of the constitution of the United States. The trial court overruled these attacks. The circuit court of appeals limited itself to a holding that it was unnecessary to pass upon those attacks and that there should be an affirmance, even if there was no violation of the Federal Constitution — and both courts held that the Federal questions presented were substantial. But appellants submit that the record does not sustain this finding; nor the finding that the amount in controversy was more than three thousand dollars.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

(Figures in parenthesis, following A. refer to the number, of the basic assignment of errors — and the figures following these refer to the print page).

I.

Contrary to the interpretation by the highest court of the state of the statutes governing the very project at bar the circuit court of appeals based affirmance on holding that the statute law of South Dakota did not authorize the board to establish and construct a new drainage ditch over the line of two older ditches, though the new project contained a materially larger area than the combined area of such old ditches, and required cleaning out, widening, deepening and diking said older ditches and

doubling their former capacity, the construction of river cut-offs to accelerate the flow of water therein, and the installation of a new and larger spillway, all at a cost of more than double that of the original ditches. (3, 4-A; R. 269).

(1-a). The Circuit Court of Appeals gave the construction of the Constitution and statutes of South Dakota an interpretation opposed to that given them by the highest court of the state, since the District Court gave its decision. (1 A; R. 266).

II.

It was error to hold that such a new project was not authorized by statute; and the testimony shows without dispute that the proceedings of the board were such as were sufficient under the statutes to establish and construct such new drainage project and make an apportionment of the benefits for the payment of the costs thereof. (5 A; R. 269).

(2-a). It has been settled by the highest court of the state in construing the Constitution and statutes of the state, and in a way that is binding on federal courts, that appellant acted on full authority and complied with the requirements of said Constitution and statutes. (R. 273).

(2-b). There is no evidence that the board ever did anything other than what it was authorized to do by the statutes and Constitution of the State. (18 A; R. 273).

III.

There is no evidence of any fraud or subterfuge on part of the board or of anyone in establishing the new ditch. (4 A; R. 268-269). Which applies also to Power Company, City of Sioux Falls, and Great Northern.

IV.

Though appellees, City of Sioux Falls, Milwaukee Railway Company and Omaha Railway Company concede that the project at bar was the creation of a new

ditch and was a new project and though the highest court of the state has so declared, the circuit court of appeals held there should be an affirmance because there had been no compliance with statutes regulating the maintenance and repair of the ditches already established. (6 A; R. 269-270).

(4-a). Not only did said three appellees concede that this was a new and independent project and not a continuation or the repair of the old drainage ditch No. 1 and the old drainage ditch No. 2, but the highest court of the state in interpreting the statutes of the state has determined that these authorized the board to construct this very ditch at bar, and that corporate drainage districts therefore were not necessary. (10 A; O. 241).

V.

Though the testimony shows without dispute that the project entered upon was such new project as was authorized by statute dealing with new projects and was entered upon and carried on in accordance with such statute, the Circuit Court of Appeals held that the proceedings were in fact for repair and maintenance only. (5 A; R. 269; 4 A; as to O and M).

(5-a). The court disregarded the fact that the project was entered upon and carried out in compliance with relevant statutes; and based affirmance on the assertion that statutes not relevant had not been complied with. (6 A; R. 269-270).

VI.

The notice of date September 15, 1916, gave legal notice of the proposed formation of the new project and that it was about to be established, and advised of a hearing to be held on October 16, at which appellees could resist the project — and appellees waived such hearing with full knowledge that they were bound by subsequent action of the board that necessarily followed in the premises. (19 A; R. 273).

(6-a). There is no evidence that either appellee

was prevented from making a full and fair defense to the establishment upon the notice given; and unless so prevented the mere statement now that this project was established by and as a subterfuge cannot avail in this collateral attack. (4 A; R. 269. — Which applies to Power Company, City, and Great Northern.

VII.

What was sustained was an enjoining of what was in effect legislative action by delegation when there should have been no injunction had it been direct legislative action. The only difference between the two being that the board in exercising the delegated legislative authority was required to give certain notices and to grant a hearing before any assessment could become a lien, with which requirement the board, according to the undisputed testimony, complied. (9 A; R. 270).

VIII.

Though it is the construction of the Constitution and statutes of South Dakota by its highest court that such board as the appellant is are not limited in establishment of or an assessment for the drainage of agricultural lands, the Circuit Court of Appeals held that their power was thus limited. (2 A; R. 268).

(8-a). Even if it were the law that the power was thus limited it is the undisputed testimony that one object of the project at bar was to drain agricultural lands. (3 A; R. 268).

IX.

The court of appeals disregarded the fact that the proceeding at bar is one *in rem* for the purpose of taxation; that dealing with such proceedings involves rules of property as to which the courts of the state are final authority, and that, therefore, both resident and non-resident property owners must, at least in the first instance, exhaust the remedies provided by the statutes of the state in state tribunals to review controversies as to such proceedings, before they may enter either state

or federal courts, at all. (11 A; R. 270).

(9-a). It disregarded that while in cases where a resident may enter the courts of his state, one who has diversity and a controversy that involves more than \$3,000. need not submit himself to the state courts but may enter the federal courts, yet in a proceeding *in rem* such as a drainage project, even the resident must first submit to administrative review provided by such statutes before he may enter the courts of the state — wherefore, the non-resident may not disregard the said statutes providing for such administrative review and may not enter the federal court before exhausting them — in other words a non-resident may enter the federal court in the first instance only in the cases where both a resident and a non-resident have the right to so enter the state court. (12 A; R. 271).

X.

The court disregarded that the notice of date September 15, 1916, and the hearing held pursuant thereto on October 2, which was notice to and opportunity to be heard on the formation of the new project, on whether appellee's property should be or was included in or was subject to the assessment of benefits, and to contest the establishment of the project, its legality, necessity, character, and purpose; and disregarded that there had been no appeal from the determination of the board had on such hearing — and it should have held that there having been no such appeal appellees are bound by said determination. (8 A; R. 270).

(10-a). The court disregarded the fact that the board was by statute given authority to determine the purpose and character of this project; that it had after notice and hearing determined that the same was for the benefit of the public health, welfare and convenience and was necessary and practicable for the drainage of agricultural lands; that from this determination no appeal was taken and that the highest court of the state has, in construing the statutes of the state, held that

where there is no appeal such determination is final. (7 A; R. 270).

XI.

The argument that appellees should not be compelled to appear at the hearing because it was before a body that had no authority to act, and that one should not be compelled to submit to a hearing before a mere trespasser disregards, first, that naked assertion the board was so without authority does not justify failing to appear at the hearing before it, and, second, it disregards the decision of the highest court of the state that the board was acting on full authority; that fact also being made to appear by the undisputed testimony. (13 A; R. 271).

XII.

If, as construed by the Circuit Court of Appeals the board so acted without authority as to be a naked trespasser, that very fact gave an adequate remedy at law in either federal or state courts, to-wit, to sue in trespass. (16 A; R. 272).

(12-a). If the board was not a trespasser and acted wholly within the law, then appellee was not entitled to any relief either in law or in equity. (16 A; R. 272).

XIII.

Assuming for the sake of argument that appellee had the right ever to enter the federal court, then it had a plain, adequate and speedy and complete remedy at law in that court by removing the entire controversy to the federal court. (17 A; R. 272-273).

(13-a). Appellee had at all times a plain, adequate, and complete remedy at law, by appeal to the Circuit Court of the State, and to the highest court of the state and ultimately, if need be, to sue out writ of error to the Supreme Court of the United States — or by another route through removal to the Federal court. (19 A; S. 291).

XIV.

The fact that appellees have failed to appeal and thus lost the ultimate remedy of writ of error to this court does not give original jurisdiction by injunction, because the failure to avail of a right which would give a remedy at law, if exercised, does not make a basis for chancery jurisdiction. (17 A; R. 272-273).

XV.

The hearing enjoined was for the purpose of equalization of a merely tentative estimate of benefits by the board; additional acts were required after such hearing before any tax assessment or servitude could become operative (14 A; R. 271-272); which means it can not be known how much was then in controversy.

XVI.

Appellees make no case under any head of chancery jurisdiction, and in essence based claim for relief upon the assertion that they were threatened with the exaction of an illegal tax. Any application for equitable relief was here premature and there could be no warrant for it until such time, if ever, as the threatened tax was about to be collected out of the property of the appellees. Up to then no more could happen than a threat to collect money on an illegal tax — and for such threatened wrong there is (if it be assumed it is needed) adequate remedy at law, either in the state or federal court or both. (15 A; R. 272).

XVII.

The Circuit Court of Appeals erred in holding that the proposal to hold such a hearing could cast a cloud on title; for other acts after the hearing were necessary before so much could be done as to finally fix an amount as being a tax, assessment or servitude. (R. 271-272).

XVIII.

The court erred in holding that the acts of the Board

could cause a multiplicity of suits against appellees; and on that point it is irrelevant that new suits might have been brought by other parties. R. 271-272).

XIX.

It disregarded that there was no testimony that irreparable injury to appellee would so arise.

XX.

Disregarded as to the City and the four Railway Companies appellees that this is so, because even if an assessment had been made and a tax had been levied, it would have created no lien on their property. (14 A; R. 271-272).

XXI.

As there was notice and opportunity to be heard and a waiver by not appearing, and as appellees stood by and without making objection to any of the proceedings, saw the expenditure of over a quarter million dollars with knowledge that same must be met out of the benefits apportioned on property which included that of the appellees, and as they actively aided and abetted said work as it progressed and made no protest — it was error to hold that appellees are not estopped from questioning the legality of said proceedings. (19 A; R. 273).

(21-a). And it was error to give the City of Sioux Falls the relief given it, because it was one of the signers of the petition — and not to hold that it was estopped to object being assessed in contribution to the cost of the construction and to challenge the project on the ground of unconstitutionality, or to assert that the laws of South Dakota had not been complied with — for it asked all to be done that was done. (21 A; S. 292).

XXII.

The District Court reserved from its decree such property as appellee Milwaukee and Omaha had within the assessment area of the old ditches and failed to

make the same reservation as to the property the City of Sioux Falls had in the same area. — And the Circuit Court of Appeals erred in affirming without modification making the same reservation as to the City of Sioux Falls. (22 A; S. 292).

XXIII.

The lower courts erred in holding that these suits were not prematurely brought.

XXIV.

It should have been held below that appellees had no right to be entertained on the chancery side of the court because they had failed to tender such amount as was due in any view.

XXV.

Aside from the fact that there was no right to entertain the complaints made by each of the plaintiffs because they declined to avail themselves of the administrative tribunals provided by the laws of the state, the sustaining of these claims was error because there was no evidence to support the complaints and it appears affirmatively and by the undisputed testimony that as a question of fact the said complaints were without foundation.

A R G U M E N T.

AMOUNT IN CONTROVERSY.

It is elementary that jurisdiction will not be sustained unless it is affirmatively shown that the jurisdictional amount in controversy exists.

Johnson v. Wilkins, 7 Sup. Ct. Rep. 600.

Washington Railway v. District, 13 Sup. Ct. Rep. 64.

Green v. Fisk, 14 Idem, at 1193.

Citizens' Bank v. Cannon, 17 Idem, at 90.

While it will not suffice that the bill asserts that more than the jurisdictional amount is in controversy, it is certainly true there is no jurisdiction where the bill makes no fact allegation tending clearly to show that the amount is large enough. Here, there is first an allegation that as to this drainage project there was a design to drain 20,000 acres of agricultural land. It is not even said there were that many acres in the district, but we assume for the sake of the argument that this much is said. But when that is admitted it is still true there is no statement describing the quality of this land or what, if any, value it had. (M. 5; R. 6; N. 5; S. 5; P. 5; O. 5). True, there is testimony that in dealing with the railroads and with the Power Company the board took into consideration the value of rights-of-way, and compared these with adjacent lands (R. 256, 257); that in assessing it considered the land owned by the railroads, the railroad itself, and their culverts and bridges. (R. 253). It is shown what property of the railroads the board found would be benefited (R. 241, 142), — but that is all, and shows nothing as to amount in controversy.

In *Johnson's case*, 6 Sup. Ct. Rep. 600, one thing stressed is that the value of the lot is not stated in any of the pleadings beyond statement in petition for removal saying it is worth more than Five Thousand Dollars. In *Washington Railway v. District*, 13 Sup. Ct. Rep. 66, it is stressed, for one thing, that the number of

the company's cars is not shown except for the years 1883 and 1884.

It would not have helped if there had been, as there is not a statement as to what said lands and the other property in the district was worth — and the value of neither is the subject of the controversy.

In *Green v. Fisk*, 14 Sup. Ct. Rep. 1193, it is said:

“There has been no order even for an accounting, and as yet we are not advised there ever will be one; much less that, if it should be made, a balance would be found due from the appellant sufficient to make the value of the matter in dispute, on an appeal by him, such as our jurisdiction requires. As the appellant, to sustain his appeal, must show affirmatively that more in pecuniary value than our jurisdictional requirement has been adjudged against him, he has failed to make a case for us to consider.”

In *Washington Ry. v. District*, 13 Sup. Ct. Rep. 66, appeal was dismissed where the bill alleged complainant had refused to pay a certain tax, and that if same be held to be a lawful tax “the amount which would probably be computed and charged against the complainant by the said municipal authorities would reach nearly if not quite the sum of \$5,200. besides interest, fines, and penalties”.

Speaking to when a possible tax becomes a finality it is ruled in *Milheim's case*, 43 Sup. Ct. Rep. 698, that while some step is still to be taken such tax cannot be treated as finally adopted. The amount cannot be based upon any contingent loss including what may result from the probative effect of an adverse judgment however certain it may be that such loss may occur. — *Ross*, 3 How. 771, *New England Co. v. Gay*, 12 Sup. Ct. Rep. 816. — And as to the prematurity of attack upon proposed taxation it is held in *Western Union v. Howe*, (C. C. A.) 180 Fed. 53, 54, that there may not be relief

"against anticipated injury consequent upon anticipated assessment before the assessment was completed".

Starting with the premise then that the jurisdictional amount must be affirmatively shown, how can it be said that this was done here.

The appellant board established a drainage district and confessedly had power to raise the cost of its construction by assessment. As authorized by valid statutes it made a tentative apportionment of benefits. After this was done notice was required, and was given, of a hearing to be had on equalizing this tentative apportionment. These suits were begun after this notice was given, and as a result the appellant board was enjoined from proceeding further and thus restrained from having a hearing as to the equalization. This means that when these suits were begun it could not be known how much the proposed assessment would finally be; and appellants allege in their answer that they have no knowledge of the total in dollars that will be finally equalized and assessed against the properties of these appellees. (N. 37; S. 36; P. 38; R. 38). It may be conceded for the sake of argument that even if the proposed equalization had been had the appellees would still have been found subject to taxation in *some* amount; but it is not the affirmative showing required by law to indulge a presumption that after equalization the proposed assessment of the appellees would have exceeded three thousand dollars.

It is the settled law of the case as well as of the state of South Dakota, that no assessment can be made (and of course no tax can be made effective) until the benefits have been ascertained and equalized. The trial Judge so ruled. (M. 79, 80). The plain language of Section 8464, Revised Statute, is that there is first to be an apportionment of benefits and that this is tentative. It is beyond question that under this statute there is no real apportionment until after equalization. From which it follows that even the possibility of an assessment does not come into being until after the equalization had been made.

The trial Judge says in his opinion: "This statute seems to provide for this hearing for fixing the proportion of benefits before the ditch is constructed and before it is known what will be the actual amount of money expended". (M. 78).

Despite all this the Circuit Court of Appeals ruled that these suits were not prematurely brought. (R. 263).

Unless something which is purely tentative is final, no one could tell at the time these bills were filed how many dollars would ultimately be assessed against either appellee.

It is a truism to say that if it be demanded of one to show affirmatively how many dollars are in dispute he does not meet that demand by saying that he does not know how much, that there has been an estimate as to what amount may by possibility be later exacted, demanded, and disputed, but that still another step must be taken before it can be known what will become of the tentative estimate.

II.

The most that can be claimed by the appellees is that when they entered the federal court they were threatened by a potential undetermined and unequalized tax, which both before and after equalization constituted but a threat of the ultimate exaction of an illegal tax. We must speak elsewhere on whether there was jurisdiction in chancery because of such threat of such a tax. It suffices to say at this point that the right to entertain in chancery is not an important thing because so long as the *status* consisted merely of such threat there was no right to enter the federal court, either on the law or chancery side — that while this remained the *status* these suits are prematurely brought — the present point being, however, that there being no more than such threat it cannot be known what amount is in controversy.

Now, while the Circuit Court of Appeals rules with

us on the premises we have just stated it declines to follow them to the deduction that must inevitably be drawn upon them. The court holds that a future undetermined, unequalized and unspecified tax cannot be taken into consideration as to the amount in controversy, because the court may not engage in speculation as to such taxes. (R. 262). But it rules further that the jurisdictional amount existed because there is a mere threat that equalization may not lower the proposed assessment below the jurisdictional amount; and that as the tentative apportionment in the case of each appellee was in a sum larger than three thousand dollars there was such possibility, despite equalization, that each appellee will ultimately be assessed in a sum greater than three thousand dollars, as that there was sufficient certainty when the bills were lodged that the amount in dispute was above three thousand dollars. (R. 262, 263). We thus have a ruling that under the law the amount in controversy could only be arrived at by the *forbidden* method of indulging in speculation as to the amount of a yet unascertained tax, and, yet, that it affirmatively and effectively appears *by speculation* as to how much the tax may finally be; that when these suits were begun more than the jurisdictional amount was in dispute.

Our view of the law is endorsed and then disregarded by the Circuit Court of Appeals. Fortunately the law which the Circuit Court disregards, is generally affirmed and also followed:

"A suit to restrain the collection of taxes not exceeding two thousand dollars in amount is not within the jurisdiction — and future taxes which may be affected by the decision cannot be included in determining the value of the matter in dispute." — *Holt v. Indiana Co.*, 20 Sup. Ct. Rep. 272.

"It will not do to assume on a showing what taxes have been in certain years that they were for similar amounts in the years in question; the requirement to make jurisdiction affirmatively appear

in the bill is not supplied by such a conjecture." — *Citizens' Bank v. Cannon*, 17 Sup. Ct. Rep. 90.

"In the same case it is said that where a bill seeks to restrain certain tax officers from collecting taxes for specific years, if the amount of such taxes does not confer jurisdiction it is from the nature of things impossible for a court to foresee what, if any, taxes may be assessed in the future; and a mere conclusion of the pleader that the taxes assessed exceeded the jurisdictional sum will not suffice. Unaccrued or unspecified taxes cannot be included upon conjecture to make up the requisite amount. — *Washington Railway v. District*, 13 Sup. Ct. Rep. 66. So of hydrant rentals which had not yet accrued but might subsequently accrue. — *City v. Farmers Loan Co.*, 12 Sup. Ct. Rep. 817. And the effect on future taxation of a decision that the particular taxation is invalid cannot be availed of to add to the sum or value of the matter in dispute." — *Holt*, 20 Sup. Ct. Rep. 273.

The Circuit Court of Appeals says:

"It has also been held that where the complaint alleges the amount in controversy to equal the jurisdictional requirement and the contrary does not appear to a certainty from the evidence that the jurisdiction will be sustained". — Citing *Maffet v. Quine*, 95 Fed. 199; *Von Schroeder v. Brittan*, 93 Fed. 9. (R. 262) — and

"If the proportion of benefits had been fixed subject to change by the board only if each appellee should convince them that their conclusion was erroneous, and in view of the claim in apparent good faith in each of the bills that the amount involved exceeded the jurisdictional amount, we hold, from a careful survey of the entire record, that the necessary amount existed in each case to give jurisdiction to the federal court". (R. 263).

Coming to the cases cited by the court and some citations in the citations, we find that in the *Maffet* case, there is a statement the court is satisfied it is enough to sustain the jurisdiction that the complaint shows the amount in controversy to exceed in value the sum of two thousand dollars, and that the contrary of this does not appear to a legal certainty from the evidence. (95 Fed. 200). The most this comes to is a statement that where the bill *does* exhibit facts to sustain the jurisdiction, then jurisdiction is established unless the contrary is made to appear by the evidence, to a legal certainty. To say the least it admits of grave doubt whether the mere fact that a bill asserts the necessary jurisdictional facts will sustain the jurisdiction where the allegation remains unproved — whether the bill suffices unless the defendant takes the burden of overthrowing its allegations. Be that as it may, we repeat that, at any rate, the *Maffet* case cannot apply where, as here, the complaint *does not* exhibit the jurisdictional facts. It is added in the *Maffet* case that the jurisdiction need not depend upon said alleged rule, although its application is decisive of the question — a statement that alone makes all said by the court bald *dictum*. Not only this, another reason why the *Maffet* decision is *dictum* on what makes sufficient amount, is it appears that one of the things involved, to-wit, the value of a flume is in itself \$2,000 (201), and it was admitted that at least \$10.00 in addition to this \$2,000. would be needed for repairs. And the court points out that the suit being in tort, exemplary damages might be awarded. Thus it was shown to a certainty that amount in controversy *was* above two thousand dollars. Where it is manifest that a sufficient amount is in fact in dispute, remarks as to what will create a sufficient amount, are not *decision*. Another case referred to by the Circuit Court of Appeals on this point, that of *Van Schroeder v. Brittan*, 93 Fed. 11, involves a finding that “from this testimony it appears to the court that the suit really and substantially involves a dispute or controversy in an amount properly within the jurisdiction of the court” — and the finding

is abundantly sustained by the record. The relief sought was a tearing down and re-building of a wall on defendants land alleged to encroach upon plaintiff's building on the enjoining land, which wall was out of repair, and recovery for injury caused to this complainant's building. Issue was joined on plea. It was proved that the removal and rebuilding of the wall would cost not less than nine hundred dollars, and complainant proved the damages to be at least \$2,700.00 — it is held that in the absence of evidence showing the claim as to amount to be colorable or fictitious, the matter in dispute exceeded two thousand dollars.

In a word — if the evidence shows more than the required amount is actually in controversy the court has jurisdiction — something that, of course, there is no quarrel about.

Another reference, in the *Maffet* case is to *Barry v. Edmunds*, 116 U. S. 558, which simply holds that the court is not at liberty to dismiss a suit merely upon personal conviction that the amount involved is less than that required to give jurisdiction unless the facts on which the conviction is based are such as to create a legal certainty for the conclusions reached. It is added that in the case then before the court there was no conviction on part of the trial Judge resting on deduction from the evidence in the case that the amount in controversy was less than the jurisdictional amount; that the action of the court was based solely on the fact that the evidence failed to establish the allegation of the complaint as to the value of the subject-matter of the suit. What the decision comes to is that dismissal should not rest on personal conviction, and it is error to rest decision upon a failure of the evidence to establish the jurisdictional allegations where the record proves affirmatively that the amount in controversy was beyond the jurisdictional one. In the *Barry* case, the answer admitted the value up to the amount of two thousand dollars, and there was testimony tending to show that the property in controversy together with other property

had previously been sold for eight thousand dollars — and it is said it is a suit to restrain the commission of a tort and therefore, one in which exemplary damages might be allowed. It is added in the *Maffet* decision that the same doctrine is written down in *Wetmore v. Rymer*, 169 U. S. 1125.

III.

Now, it may be said that if this is so as to the right of appellees to enter the federal court the same trouble confronts us in entering this court. It is to be answered, first, that two statutes are independent. The three thousand dollar one deals with the situation when the suit is begun, the one thousand dollar statute with the situation when appeal to this court is taken. It is obvious there might be one thousand dollars involved at the time appeal is perfected though there is not three thousand dollars when the bill was filed. But passing that, it is plain on this record that so far as the present appeal is concerned there is more than one thousand dollars in controversy. The test now is how much has been adjudged to these appellees. — *Green v. Fisk*, 14 Sup. Ct. Rep. 1193. It is admitted no assessment has yet been made and not a dollar of tax as yet collected; there has been an expenditure of over \$250,000; drainage warrants for that amount are outstanding, and they must be paid if at all by collecting the assessment that this injunction stopped. The tentative apportionment against the appellees is roughly, \$112,000. (Page 13 in N., P., R., S., O. and M.). But on the point under discussion little attention need be paid that fact. There is at this time more than One Thousand Dollars in dispute no matter how this \$112,000.00 is treated. Be it tentative or final the appellants will never receive any part of it, if there be an affirmance. We might well claim that this fact alone supplies the jurisdictional sum for this appeal. But this \$112,000 can be eliminated from consideration and there will be still more than One thousand dollars involved. The drainage project has been practically completed at a cost of something over \$250,000.00. It has

all been financed by drainage ditch warrants in the hands of intervenors. No part of these warrants has been paid. The only way in which they can be paid is by assessment. No matter whether any part of this assessment falls on the appellees, the board must still raise above \$250,000. If there be an affirmance it will be settled against appellants that the drainage project at bar has no standing in law and that, therefore, no assessment to pay for its construction is authorized. Whether or not there be now the right to assess these appellees is at this point unimportant because it is definite and certain that, unless there be a reversal, the decision of the Circuit Court of Appeals has taken from the appellant board the power to raise by assessment, or at all, the sum expended, or \$250,000. It is obvious, therefore, that by reason of said decision there is now more than One Thousand Dollars in controversy, no matter how much or how little was in dispute when these suits were begun.

In addition to what has just been said we are fortified by the decision of this court in *Butte v. Clark*, 39 Sup. Ct. Rep. 233. In that case this court said that an averment that more than \$50,000 was involved was explicit and that it may assume this averment had a purpose — and adds:

“But appellees do not wish to be taken at their word. The confidence they thought and expressed when invoking the power of the court in the first instance — and providing, we may assume, for review in case of an adverse decision — they now recant, and urge that it should not be used to question or disturb their success or become an avenue of relief to their antagonist. This is not unusual and counsel has cited prior examples and the action of the court therein”.

“The principle of decision which the court then announced is familiar. It is that the ground of

jurisdiction in the District Court and ultimately in this court on appeal from the Circuit Court of Appeals, is the statement of the suing party of his cause of suit".

It will be noticed that the decision in the Clark case says not only that the statement of the suing party of his cause of suit is the test for entering the Supreme Court on appeal, but also that it is the test of the jurisdiction in the District Court. This latter is *obiter*. The question before the court was not what amount would permit entering the trial court but the amount necessary to enter the Supreme Court on appeal. There was no occasion to argue and there was no presentation upon the conditions precedent to the jurisdiction of the trial court. And in the teeth of the statute and very many decisions in this court it can hardly be claimed seriously that it was intended to hold in the Clark case that the District Court of the United States obtained jurisdiction merely because some one brought suit for more than three thousand dollars and stated as a conclusion that more than that sum was in controversy. Indeed, this is made clear because the court says in the Clark case that of course there must be more than mere verbal assertion. While *we* may raise that there is no substance in the claim that more than three thousand dollars was in controversy when the suits were brought, of course it does not lie in the mouth of appellees to say that their allegation as to value was not made in good faith and lacked substance. What the Clark decision *decides* is that a victorious appellee who has at all times asserted that more than three thousand dollars was in dispute is estopped to deny that assertion when the defeated party appeals to this court; that the victor cannot treat his statement of claim merely as something that permits him to appeal if he encounters an adverse decision; that he may not so use his claim, and then "recant and urge that it should not be used to question or disturb their success, or become an avenue of relief to their antagonist".

We submit the District Court lacked jurisdiction be-

cause it not only is not affirmatively shown that when suit was brought there was more than \$3,000 in dispute — but it appears affirmatively that at said time it could not be known how great a sum *was* involved in controversy.

We submit further that when these appeals were allowed and perfected a sum greater than one thousand dollars would be gained if there be reversal and lost if there be affirmance.

III-1

IS NOT A CONTROVERSY OF MORE THAN THREE THOUSAND DOLLARS REQUIRED EVEN IF A CAUSE DOES PRESENT A CASE ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES.

We have first to consider the first section of the Act of March 3, 1887, as corrected by the Act of August 13th, 1888. (25 Stat. 433, c. 866). It gives the trial federal courts jurisdiction of all suits of a civil nature where the matter in dispute exceeds a stated sum providing they are suits "arising under the Constitution or laws of the United States". As to this, *Holt v. Indiana Company*, 20 Sup. Ct. Rep., at 273, 274, construes *United States v. Sayward*, 160 U. S. 493, to hold, "that the sum or value named was jurisdictional; and that the Circuit Court could not under the statute take original cognizance of a case arising under the Constitution or laws of the United States unless the sum or value of the matter in dispute exclusive of costs and interest, exceeded (the required sum)". It is said in the *Holt* case, that the *Sayward* decision was reaffirmed in *Fishback v. Telegraph Company*, 161 U. S. 96, 99.

So far then as the act of March 3, 1887, corrected by the Act of August 13th, 1888, is concerned, the District Court had no jurisdiction unless in addition to a case arising under the Constitution or laws of the United States more than three thousand dollars was in controversy.

It is true the Act of March 3, 1891, "was to do

away with any pecuniary limitation on appeals directly from the Circuit Courts to this court". So says the *Holt* case, 20 Sup. Ct. Rep. 274. It is obvious that the Act of 1891 applies only where there is direct appeal from the trial court to the Supreme Court. Wherefore, the *Holt* case rules that the Act of March, 1891, does not change that in all cases where there is not a direct appeal from the trial court to the Supreme Court it is still necessary to the federal jurisdiction that there be first a substantial federal question in a case arising under the Constitution or laws of the United States, and that in addition the amount in controversy be above the required sum.

True, there are constitutional and statute provisions regulating what will be entertained in the Supreme Court of the United States on writ of error to the highest court of the state. But it is self-evident that these provisions can have no application here.

It follows that if here there was not the required amount in dispute it will not save the jurisdiction if it be assumed the case presented a substantial federal question.

But we submit that at all events there was no such question though the lower courts found there was — which will be elaborated later — and we submit further, that if the fact that the South Dakota statute law was unconstitutional were a material fact here, that they are not violative of the Constitution. — Which brings us to the question:

III-2

DO THE RELEVANT STATUTES VIOLATE THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION?

So far as violating the due process clause is concerned, surely no elaborate presentation is demanded of us. It was for the appellees to obtain an affirmative holding that the Dakota statutes were unconstitutional. Instead, as will presently appear, the trial court ruled that these statutes did not conflict with the due process

provision and the Circuit Court of Appeals found it unnecessary to say whether this was or was not true. No one has appealed from this particular ruling of either the trial court or the Circuit Court of Appeals, and the appellees have against them a finding of the trial court that they had not sustained their claim of unconstitutionality; and were not relieved by anything that the Circuit Court of Appeals says. At the very best for appellees, they have up to this time failed to secure a finding that their assertion of unconstitutionality was tenable, and not having appealed are in no position to have that fatal condition of affairs remedied.

Coming then briefly to the substance of the question, we have to say Section 8461, Revised Code of South Dakota, 1919, has the following provisions:

"The Board shall fix a time and place for the hearing of the petition and giving a described notice of the hearing."

"The notice shall describe the route of the proposed drainage and tracts likely to be affected, in general terms."

"This notice is to advise all affected to appear at the hearing and show cause why the proposed drainage project should not be established and constructed."

The trial court so held (M. 77), and it declared:

"We find that all of the objections center about the criticism that no notice is (therefore) provided the owners of land affected by the drainage ditch except the general notice, and in fact, no personal notice until the date fixed by the board for the equalization of proportional assessments for the various tracts of land benefited by the drainage" (M. 79, 80).

"In my judgment the South Dakota statutes, enacted in the light of that provision of the Con-

stitution of the State providing for the drainage of agricultural lands, is constitutional". (M. 83).

We respectfully submit that the drainage statute of South Dakota does not in fact violate the due process clause, and that, moreover, it is the settled law of the case that they do not.

(Citations for this will be put into the summary of the argument, which will follow the argument).

IV.

AS TO THE CONTENTION THAT THERE HAS BEEN A DENIAL OF THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

On this issue develops inquiry as to whether (a) there is plea that the statutes involved violate the provision of the Constitution of the United States that equal protection of the laws shall not be denied. — In other words, whether it can be told from the pleadings whether it is an infraction of the *Federal Constitution* that is charged; (b) whether aside from challenging the validity of said statutes there is clear pleading that what appellant board did violates the *Constitution of the United States*; (c) whether there is decision in the lower courts on whether there has been a denial of the equal protection of the laws such as is guaranteed by the Federal Constitution.

Our first position is that whatever infraction of Constitution is charged on this head, the plea is such as that it does not present definitely what Constitution the pleader refers to; that the plea is merely that certain things are in certain named respects "unconstitutional and void" — and that the pleader may well be referring either to the Federal Constitution or the Constitution of South Dakota. In other words, the Constitution of the State forbids denial of the equal pro-

tection of the laws in practically the same words in which the Constitution of the United States forbids, and that for all that appears nothing may be charged except an infraction of the Constitution of South Dakota. The allegations in question are first made in the bills. In them it is said, first, that the statutes involved are unconstitutional and void, and that they violate a certain provision of the Constitution of the State of South Dakota and as well the Fourteenth Amendment of the Constitution of the United States — a clear plea that each of these constitutions are being violated by what is complained of. Then follows an allegation merely that said statutes are "further void and unconstitutional". It is not said at this point, as was done earlier in the plea, what Constitution is being violated. The allegation last spoken to is this:

"Said statute, Exhibit "A", is further void and unconstitutional in that the same provides no fixed and determinable method or rule for the apportionment of benefits upon the property and property owners situated within the drainage area and especially in that said purported statute furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad companies and other corporations and upon the property of municipal and quasi municipal corporations and upon plated property in cities and villages. * * *". (R. 15; S. 14; N. 13, 14; P. 15; O. 15, 16; M. 15).

We repeat that so far there is a charge which for all that appears may be addressed either to the Constitution of the United States or that of the State; and submit that under well settled principles of pleading federal questions this fails sufficiently to present one.

As distinguished from attacking the constitutionality of the statutes of South Dakota there is allegation which makes attack not upon the statutes which authorize action but upon action taken.

It is charged in the Rock Island bill, only, "that the said equalization of benefits is so arbitrary and discriminatory against the property of the plaintiff as * * * to deprive the plaintiff of the equal protection of the laws". (R. 15). This does not so much as mention any Constitution, and while it is true that depriving one of the equal protection of the laws is forbidden by the Constitution of the United States, it is also forbidden by the Constitution of South Dakota. But each of the plaintiffs filed an amendment. This amendment is this:

It first sets out the number of units out of the total which was tentatively apportioned to the plaintiff, and with this a statement of what this tentative apportionment comes to approximately in dollars. Then it is said:

"That said equalization of benefits is wholly speculative, arbitrary, unjust, illegal and discriminatory and was made by the board without any reasonable or rational basis therefor, and is not in proportion to any benefit which the property of the plaintiff has received or ever can receive by reason of the rebuilding of the spillway, the cleaning out, repairing and maintaining of drainage ditch No. 1 and drainage ditch No. 2, as set forth herein; that the property of the plaintiff has not been and never can be benefited by the work performed by the board as herein set forth to the extent of (the approximate sum in dollars and cents charged to be the equivalent of the tentative apportionment of benefits) or to any extent whatever, and that the assessment sought to be collected from the plaintiff as above set forth is out of all proportion to the assessment sought to be collected from the agricultural lands situated north of the city of Sioux Falls. That the said equalization of benefits is so arbitrary, and discriminatory against the property of the plaintiffs as * * * to deprive the plaintiff of the equal protection of the laws." (R. 80, 81; O. 66; S. 65, 66; P. 79, 80; N. 78, 79; M. 72, 73).

We submit that no plea presents that the action of the board was in violation of the Constitution of the United States.

The trial Judge states in his opinion that specified acts are complained of and that there is claim "that the plaintiffs are therefore deprived of the protection of the laws which must be extended to all". (M. 84). This, too, makes no mention of any Constitution. Then the trial Judge proceeds as follows:

"The proofs overwhelmingly (Show) * * * * that the taxation that is imposed upon each of the plaintiffs is a much higher rate, and upon a different basis than the tax upon land lying within the district. As a matter of fact, no direct benefits to the property of the railways within the city are shown. It is further shown that the benefits estimated upon the plaintiff's property were upon no standard that would properly produce results approximately the same as those upon the land in the drainage district. Taking for instance the tax upon one of the plaintiffs, the City of Sioux Falls, for its miles of streets, with no pretense that there is any method of taxation or measuring a benefit or a gain, that would produce even approximately correct general results, when considered with benefits to the lands in the district. Simply a vague, indefinite generality, indulged in by the engineer and adopted by the board. Benefits purely fanciful with no substantial basis. Take the railroads * * * * there is no pretense that the basis used had any relation to that used in fixing the value upon the lands in the district. It is admitted that the basis was wholly different from that used for ascertaining the contribution demanded of individual owners". (M. 90, 91).

In effect this is a holding that plaintiffs received no direct benefits and that the method of seeking to ap-

portion benefits to them was arbitrary, unreasonable and fanciful, and that the assessing board discriminated as between these plaintiffs and those within the district who owned lands. There is not a word said by the trial Judge about any Constitution. His assertion on the findings of fact just referred to is:

"I find that such difference clearly produces manifest inequality. There is an absence of the equal protection of the laws that must be extended to all". (M. 91).

This may well mean that a common law right to the equal protection of the laws has been infringed upon, or that the guaranty of the Constitution of the State of South Dakota that no one shall be deprived of the equal protection of the laws has been violated — and of course it may mean, too that the facts found constitute a violation of the Constitution of the United States. But what is required is a record, showing a decision that the Fourteenth Amendment has been disregarded.

After thus stating his conclusion the trial Judge to some extent, in substance, repeats what he has already said. He added "that the attempt to assess the property of these plaintiffs was an afterthought". He repeats plaintiffs could not be benefited, says "there is no reasonable ground upon which the action of the board could be predicated", that "there is no pretense in this record that the railroad companies were treated like the owners of agricultural lands; says the discrimination is palpable, and the amount assessed simply an arbitrary assessment." One illustration the Judge makes is to say that the Power Company was assessed \$50,000.00, or one-fifth of the entire expense "although there is included in the pretended district agricultural lands something like twenty miles in length and several miles in width". At this point the court overlooked that there was no showing whatever as to what the property of the Power Company was worth nor what these agricultural lands were worth. The opinion continues that the injustice of what was done to the Power Company is ap-

parent when it is noted the record shows it was located on the rapids of the Sioux River in the City of Sioux Falls, has been located there for many years and was therefore entitled to the water that naturally flowed down the stream to the end that it might secure power requisite for the conduct of its business. (M. 91). As said, this is in effect a repetition, and the conclusions of the court noted herein earlier and stated before this repetition are not repeated. But in fairness it may be said to embrace what is said following the statement of said conclusion.

As has been said, these appellees had the burden of obtaining from the courts a finding that what had been done denied the provision of the Constitution of the United States that no one should be deprived of the equal protection of the laws. We have pointed out that no such issue was raised and that no such decision was obtained below. We have also pointed out before, that the Circuit Court of Appeals left the matter where the trial court placed it and declined to find that the equal protection clause of the Constitution of the United States had been violated — thus, as we contend, leaving the appellees without either plea or decision that there had been any infringement of the equal protection clause of the Fourteenth Amendment.

V.

IF IT BE ASSUMED A SUFFICIENT SUM IS IN CONTROVERSY,
STILL NO SUBSTANTIAL FEDERAL QUESTION
WAS PRESENTED.

Though neither of the lower courts gave the appellees any relief on the ground that there had been a violation of the Constitution of the United State, the question remains whether though in fact the Constitution had not been violated there was reasonable ground for asserting that it had been. Each of the lower courts held that a substantial federal question had been presented. And what we have now to deal with is whether these findings ought to be sustained here. The test is in a way a matter of degree. If a party sought to enter the federal court by taking a position which this court had time and again held to be untenable all would concede that no substantial federal question was being presented. If to find the question to be unsubstantial resort must be had to complicated analysis it would be held that the question presented was substantial though such analysis might demonstrate that it was not. Somewhere between these two illustrations lies the test which is, after all, whether reasonable men and practitioners versed in the law may reasonably differ on whether the assertion is or is not well made. If there may be such difference, there is a substantial federal question.

To apply this test it is necessary to examine what the assertion is. First, is the statement of the following naked conclusion:

"The 'purported' statute of the state of South Dakota 'is unconstitutional and void' in that the same is in violation of Section two of Article Six of the Constitution of the state of South Dakota, and in that the same is in violation of the Fourteenth Amendment of the Constitution of the United States." (R. 15).

Next comes an allegation which is practically a naked conclusion, to-wit:

"If said apportionment of benefits be made as threatened by the board and as is provided in the notice given 'the same will constitute the taking of the property of plaintiff and of the other property owners affected by said notice without due process of law'." (R. 15).

Then follows specific complaint:

"Said statute is 'further unconstitutional and void' in that the same provides for an assessment against property without the right of the property owners to be heard thereon and without notice of any character to the property owners." (R. 15).

"Said statute is 'further void and unconstitutional' in that the same provides for no fixed and determinable method or rule for the apportionment of benefits upon the property and property owners, and especially in that said purported statute furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad companies and other corporations and upon the property of the municipal and quasi municipal corporations and upon platted property in cities and villages." (R. 15).

"Each plaintiff filed an amendment to its bill, alleging that the apportionment of benefits assessed and the amount of such assessment in dollars and cents 'is wholly speculative, arbitrary, unjust, illegal, and discriminatory and was made by the board without any reasonable or rational basis therefor'."

"That the said equalization of benefits is so arbitrary, and discriminatory against the property of the plaintiff as to deprive plaintiff of its property without due process of law and to deprive it of the equal protection of the laws." (R. 80, 81).

"That the property of the plaintiff has not been and never can be benefited by the work per-

formed by the board as herein set forth to the extent of the amount in dollars assessed, or to any extent whatever”.

“And it is not in proportion to any benefits which the property of plaintiff ever received or ever can receive by reason of the rebuilding of the spillway, the cleaning out, repairing and maintaining of drainage ditches No. 1 and No. 2 as set forth herein”.

“The assessment sought to be collected from the plaintiff as above set forth is all out of proportion to the assessment sought to be collected from the agricultural land situated north of the City of Sioux Falls.”

Aside from statement of naked conclusions we have a claim (a) that the statutes provide for an assessment against property without notice to or right of the property owners to be heard thereon; (b) that a threatened apportionment of benefits will constitute a taking without due process of law; (c) that the statute provides for no fixed or determinable method or rule for the apportionment of benefits; (d) that this is especially so as to apportioning benefits on the property of railroads, other corporations and of municipal and *quasi* municipal corporations, and on platted property in cities and villages. (R.15); (e) that the tentative benefits assessed are “wholly speculative, arbitrary, unjust, illegal, and discriminatory, and made without reasonable or rational basis; (f) the the proposed equalization of benefits is so arbitrary and discriminatory against the property of plaintiff as to deprive it of its property without due process of law and to deprive it of the equal protection of the laws; (g) that the property of plaintiffs has not been and never can be benefited by the work performed by the board to the extent of the proposed assessment or to any extent; (h) that the tentative apportionment of benefits is not in proportion to any benefit which the property of plaintiff has received or ever can receive from the rebuilding of the spillway, and the cleaning out, re-

pairing and maintaining of the new drainage ditches; (i) that the assessment sought to be collected is entirely out of proportion to that sought to be collected upon agricultural land situated north of Sioux Falls. (R. 80, 81.)

The only further attempt to charge unconstitutionality (if it be that) is found in certain allegations which each of the lower courts found to be true, to-wit: that the formation of the so-called new ditch was simply a pretense and subterfuge resorted to for the sole purpose of attempting to burden plaintiffs with the cost of maintaining the old ditches; (M. 89); that there was merely assumption to institute a new drainage district and to assess benefits to the property of the plaintiffs that was located in the City of Sioux Falls; (R. 255); that what was in fact done is a subterfuge for the purpose of obtaining money for mere maintenance and that the statutes governing assessment for maintenance were not followed; (M. 87); that the proceeding was not an independent project but was an attempt to maintain and repair existing ditches or to take care of conditions that resulted from the imperfect and inadequate construction of the old ditches; (R. 257); that instead of charging the repair and maintenance to those who were responsible for the defective construction and proceeding under statutes authorizing levy for repair and maintenance the board assumed the right and authority to construct a new drainage district without abandoning any of the old ditches, with no thought of using a new and different drainage and with the sole purpose to maintain and perfect that which had in the past been inefficiently constructed; that there was no thought or purpose except to repair the damage that had already been done and prevent further damage (M. 89); — and that there is no statute authorizing the board to take in other lands to help bear assessment of burden created in maintaining the original drainage; that the only authority was to provide payment for maintenance and repairs of the old ditches. (R. 255, 256).

We feel clear that this assertion of subterfuge is not charged to be a violation of the Constitution of the United States and that there is no decision below holding that the subterfuge so called would violate any such provision. But we have thought best to set forth all there is on this head so that our discussion of whether there was a substantial federal question may cover all that by possibility can be claimed to be the assertion of a federal question.

First, then we have questions of fact, to-wit: (a) is it true no notice or hearing is provided for the property owner; (b) or that there is no provision for a fixed or determinable method or rule for the apportionment of benefits; (c) or that the tentative apportionment is speculative, arbitrary, unjust, illegal and discriminatory, and made without reasonable or rational basis; (d) or that the plaintiffs derived no benefit from the improvement equal to the proposed assessment or indeed any benefit; (e) does the proposed assessment unduly discriminate in favor of agricultural lands; and (f) was the establishment a pretense and subterfuge.

V-1.

As to notice and right to be heard. — Section 8458, Revised Code of South Dakota, 1919, provides that the board of County Commissioners may at any regular or special session establish or cause to be constructed *any* ditch or drain. Section 8459, that the board shall act only on a written petition signed as required by statute and that such petition shall set forth the necessity for the drainage, a description of the proposed route by its initial and terminal points, its general course or its exact course in whole or in part, and also a general statement of the territory likely to be affected thereby. Section 8476, that no proceedings affecting the rights of persons in the establishment of the drainage district shall be had except upon notice prescribed by statute to be given as to the construction of

drains. Section 8461, that there shall be a time and place for the hearing of the petition, that notice shall be given thereof by prescribed publication; that such notice shall describe the route of the proposed drainage and the tract of country likely to be affected thereby, in general terms, and the notice shall further refer to the files in the proceedings for further particulars. It is to summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed. Section 8462, provides that at any such hearing any person interested may appear and contest the statements of the petition and matters set forth in the surveyor's report required and may contest the findings of the board as to width and route; and the petitioners may be heard in like manner in support of the petition. It is after full hearing that the drainage may be established along the lines set forth in the petition or in the finding of the board prior to hearing; and the action on the petition is had at the time named in the notice. (8461). The Circuit Court of Appeals finds, as it was bound to do under undisputed testimony, that the foregoing general notice addressed to all who were affected had been given. (R. 250, 251). — And the trial court ruled (and that is still unchanged) that such notice obviated violation of the federal Constitution.

Proceeding under Section 8462, if the board after full hearing and consideration finds the project sought to be established is conducive to the public health, convenience, or welfare, or necessary or practicable for drainage of agricultural lands, it establishes the project. Not only is there this notice and opportunity to be heard before the petition is acted on but after the drainage system has been established, when the board enters into the statutory duty of apportioning benefits; Section 8463 requires that it shall appoint a time and place for equalizing same; that it shall give notice of the proposed equalization in a described manner; that such notice shall state the route and width of the drainage project established, giving description of each tract of land af-

fectured by the proposed drainage, and the names of the owners of the tracts involved as they may be found in the records of the office of the Register of Deeds at the time the petition was filed. The notice must further state the proportion of benefits fixed for each tract, taking any particular tract as a unit. It is to notify all such owners to show cause why the proportion of benefits shall not be assessed as was tentatively done — and the statute further provides a hearing for the purpose of equalizing the proportion of benefits tentatively apportioned which shall be a final equalization and shall fix assessment according to benefits received.

It is provided by Section 8463, that:

“Benefits to be considered in any case shall be such as accrue directly by the construction of said drainage or indirectly by virtue of such drainage being an outlet for connecting drains that may be subsequently constructed”.

After equalization, the statutes open wide the doors of judicial review.

Under Section 8469, any one deeming himself aggrieved by the action of the board of equalization may appeal to the Circuit Court of the state, and any number of persons interested may join in the same appeal. On that appeal there may be review of the fixing of the proportion of benefits, the acceptance of the drainage, and of whether the project is conducive to the public health, convenience, or welfare, and whether it is necessary or practicable for the purposes of draining agricultural lands. The scope of the review in court is so broad as that the statute requires certifying to the court the petition and all other papers and records in the matter. Relative benefits and whether the tract taken as a unit is or is not benefited and if benefited to what extent, may be inquired into by the court. The matter shall be heard in the Circuit Court as an original action. (8469) — and if the defect is substantial the court shall of its own motion determine the rights of the parties,

validate the proceedings as justice may require and if it shall find cause for such validation or such action should have been taken in the first instance, providing all parties interested are before the court. (8488).

It would seem clear, then, that the statutes do not provide for an assessment without notice to or right of the property owners to be heard; and it is without dispute that everything required by valid statutes with reference to notice or opportunity to be heard was complied with.

It seems equally clear that the statute does not have the vice of failing to provide for a fixed or determinable method or rule for the apportionment of benefits. Is this court warranted in following the lower courts by holding that the learned counsel who prepared the bills had the right to believe, or indeed, did believe, that the South Dakota statute so operated to deprive of due process and of the equal protection of the laws as to be violative of the Constitution of the United States. At the time the bills were framed the reports of this court and of most of the courts of last resort of each of the states were filled with decisions that statutes in substance like those of South Dakota were not open to the objection of running counter to the federal Constitution. These reports were full of decisions that where, as here, administrative tribunals were provided to hear objections to a drainage project, both as to validity and reasonableness, and where judicial review of the action of these tribunals was provided, no federal question arose, especially where, as here, there was a failure to invoke the action of said tribunals, or where, if invoked, resort to the courts that was permitted was, as here, not availed of. It would be both impossible and useless to give even as much as a reference to those almost innumerable decisions. Something in the way of support we will enter upon here. And the summary or brief will exhibit what little else in the way of citation of authority we may exhibit without being guilty of pedantry.

The trial court finds in its decision that the statutes at bar are not unconstitutional. And it puts it thus:

"It is universally held 'that a law that provides for notice and an appearance and the right to contest the amount of the tax, and to contest the right to tax at all, with the right of appeal therefrom, as given to the land owners prior to the time that a tax is levied and becomes effective, is due process of law'." (M. 80).

The opinion cites authorities in this court and in other courts of last resort to the effect that there is no violation of the federal Constitution where notice is given at some time; where a hearing is provided in which everything involved may be contested, and especially if review in the courts is provided after the administrative tribunals have been exhausted. (M. 80, 81, 82).

And it decreed that all required to keep out of conflict with the due process clause, had been done. It finds that the legislature has provided no tax can become effective, and no assessment can be made, until the benefits have been ascertained and apportioned; and before this can be done a definite day must be named by the board and land owners are given notice. (M. 80). It finds the day was named and the notice given.

It is held in *Soliah v. Heskin*, 222 U. S. 522:

"Neither does that amendment invalidate an act authorizing an appointed board to determine whether a proposed drain will be a public benefit and create a drainage district consisting of land which it decides will be benefited by such drain, and to make special assessments accordingly, if, as here, notice is given and an opportunity to be heard afforded the land owners before the assessment becomes a lien against his property".

And again this Court said:

"The motion to affirm the judgment should, however, be granted if the question on which the

decision depends are found to be so wanting in substance as not to need further argument." Milheim, 43 Sup. Ct. Rep. 696; Hodges, 43 Sup. Ct. Rep. 435.

Surely, ample notice and opportunity was given; and given when no assessment yet existed.

We repeat that no lawyer was justified in thinking that the South Dakota Statutes violated any guaranty of or right given by the Constitution of the United States.

V-2.

We have set forth heretofore the claim that the establishment of the project at bar was a mere subterfuge, an allegation which might by possibility be interpreted to charge a fraud if some elements that do not exist, existed. That is to say, if the plaintiffs were prevented from protecting themselves against such a fraud such subterfuge might possibly be a basis for invoking the aid of the federal courts, provided of course, the requisite amount was in controversy. But here, in no view is such a charge of fraud, because the record shows without dispute and the framers of the bills must have known that provision was made for such notice and such hearing thereon as would enable the plaintiffs to resist assessment on the ground that the project was not of a character which authorized assessing them. Nor do we overlook that if it were granted the federal court had jurisdiction it had power to pass on the question of whether there had been such subterfuge even though that is not a federal question.

We shall later assume for the sake of argument that there was power in the court to determine whether or not there was the alleged subterfuge. We shall deal with it by attempting to show that in truth the charge of subterfuge is unfounded. What concerns us now is whether the pleading of this subterfuge creates a sub-

stantial federal question, or any such question. Surely, it will be conceded that the federal court cannot obtain jurisdiction by a charge of fraud when there is no claim made that the fraud violated any federal constitutional provision, or law. And that is this case.

What is in Paragraph Nineteen of the bill of the Appellee Rock Island sets forth both generally and specifically all things that are asserted to be an infraction of the Constitution of the United States. The bill of each appellee is identical on this point with that of the Rock Island. And not so much as a mention of subterfuge or fraud of any sort may be found in the allegations of the bill that attempts to present a federal question.

VI.

DELEGATION BY LEGISLATURE.

The view taken by the legislature as to what is prudent and comports with propriety and justice in fixing a drainage tax district, or in declaring how much tax shall be raised and the method of raising and distribution, cannot be reviewed by the courts, though the legislature may have erred. — *Spencer's case*, 8 Sup. Ct. Rep. 926.

If then the project at bar had been created by direct action of the legislature any provision of the act declaring what property is benefited or specially and peculiarly benefited would be beyond all judicial review, and would not be affected by the Fourteenth Amendment. — *Milheim's case*, 43 Sup. Ct. Rep. 698; *Spencer's case*, 8 Sup. Ct. Rep. 925, 927. This has been said even where the view that there was a benefit was based on the thought that the drainage would tend to increase the traffic of a railroad taxed. — *Thomas*, 277 Fed. 711. So of claims that an act of assembly creates over-taxation. — *Milheim's case*, 43 Sup. Ct. Rep. 698. So of the amount to be raised. — *Spencer's case*, 8 Sup. Ct. Rep. 925, 927; *Martin's case*, 27 Sup. Ct. Rep. 442, and cases cited. — All this, though the result accomplished be unjust. — *Spencer's case*, 8 Sup. Ct. Rep. 925. It follows, of course, that the legislative determination as to what is benefited and therefore what should be included in the district is beyond judicial review. — *Bush's case*, 251 U. S. 190; *Thomas*, 277 Fed. 711; *Spencer's case*, 8 Sup. Ct. Rep. 926.

All these things that the legislature may do and which are beyond judicial review when done by it, it can delevate, say, to commissioners. — *Spencer's case*, 8 Sup. Ct. Rep. 925, 927. In the case of *Embree*, 36 Sup. Ct. Rep. 319, what the legislature might have done for itself in the premises was delegated to the County Court, and there was held to be committed "to the judgment and discretion of that Court whether there is need for the

district and if so what lands should be included and what not included”.

True, the project at bar was not created by direct action of the South Dakota legislature; equally true, that general statutes gave appellant board all such powers in the premises as the legislature could exercise by special and direct action. That this board could on the authority of the general statute do all that the legislature could do by special act is beyond question. But there is one difference. Had the establishment been made by special act no notice to those affected was required and there could be no judicial review. But when the legislative authority is exercised on delegation, action is invalid unless the statute under which the one proceeding under delegated authority acts makes provision both for proper notice by the board, adequate hearing before it, and some method of review on direct attack. — See *Spencer's case*, 8 Sup. Ct. Rep. 927. In the case of *Fallbrook v. Bradley*, 164 U. S. 112, this Court said:

“The legislature not having itself described the district, has not decided that any particular land would or could possibly be benefited as described, and, therefore, it would be necessary to give a hearing at some time to those interested upon the question of fact whether or not the land of any owner which was intended to be included would be benefited by the irrigation proposed. If such a hearing were provided for by the act, the decision of a tribunal thereby created would be sufficient”.

While perhaps that has not been specifically settled, it is probable that the review on direct attack should include some hearing in a court of competent jurisdiction, and, possibly, in a proper case, a hearing in this court on writ of error to the highest court of the State.

We have already shown that required and sufficient notice and opportunity to be heard are provided by the South Dakota statute, and were given, and that ample review is provided.

VII.

THOUGH FIVE OF THE APPELLEES HAVE DIVERSITY AND
THOUGH IT BE ASSUMED FOR THE SAKE OF ARGUMENT
THAT THERE IS A SUFFICIENT AMOUNT IN CONTRO-
VERSY AND THAT A SUBSTANTIAL FEDERAL QUESTION
HAS BEEN PRESENTED, STILL THERE IS NO RIGHT TO
ENTER THE FEDERAL COURTS WITH THIS COLLATERAL
SUIT, BECAUSE THE APPELLEES HAVE NOT EXHAUST-
ED THE ADMINISTRATIVE TRIBUNALS TO WHICH THE
STATUTE OF THE STATE HAVE GIVEN THE POWER TO
CORRECT ALL THAT APPELLEES COMPLAIN OF, BEAR-
ING IN MIND ALSO THAT THE HIGHEST COURT OF THE
STATE HAS DETERMINED THAT SAID TRIBUNALS HAVE
SAID POWER.

See for illustration, *Bagley v. Butler*, 24 S. D. 426.

We are not unmindful it is the settled law that one who *does have* the right to enter the federal courts cannot be kept out of them by any state statute or state action, direct or indirect, and that where he *does have* the right to enter he is not bound to observe statute provisions making it a condition precedent that he first exhaust such tribunals as the state has provided. But to apply this, in a way, begs the question. When the inquiry is *whether* one has the right to invoke the aid of the federal courts there may not be applied rules which govern only where it is the fact that he does have the right to invoke it. Passing that, one who has diversity or sufficient amount in controversy and a substantial federal question is relieved from exhausting the state tribunals, only, where the resident citizen may enter the courts of his state. If before beginning suit in state court the citizen of the state must first exhaust certain administrative tribunals, then the non-resident of course cannot enter the state court without having so exhausted. And if neither can enter the state court before final action by the provided administrative tribunals, neither

may enter the federal court without first exhausting those tribunals. It is well said in *Regan v. Farmers Company*, 154 U. S. 362, 14 Sup. Ct. at 1052:

"A state cannot tie up a citizen of another state having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts".

In other words, the rule just stated involves no attempt by a state to keep a non-resident out of the federal courts. Such rule is not a matter of state law at all. It is general law, and asserts no more than that no one may enter the federal courts, in the first instance, if no one may obtain in the state courts what is sought in the federal court without first exhausting the power of administrative boards which the state has provided for its own citizens and which the citizen of the state must first exhaust before he may enter the courts of the state with a civil suit; especially suit seeking an injunction to stop the operation of the taxing power. It would be remarkable doctrine that when *the citizen of the state* claims that the taxing power is as against him proceeding in violation of state or federal constitution or both, or is otherwise acting illegally, that *he* may not resort to civil suit until he has obtained the final decision of the administrative boards provided and having presented and redressed his grievances, — but that the mere fact that the one who suffers from the identical acts from which the citizen of the state suffers can by reason of his residing in a place other than where his property lies override the conditions precedent which the state in which such property lies insists upon before opening the doors of the court *to its own citizens*.

2.

There is of course no question that here is a collateral suit; that the appellees have never attempted to

avail themselves of said machinery for administrative relief; relief from tribunals acting *quasi* judicially. It remains to discuss whether this machinery has power to redress what is complained of in the collateral federal court suit. And whatever the highest court of the state has ruled as to what those powers are is conclusive here, and said court has so spoken.

We submit the state of South Dakota not only has provided ample power in certain administrative bodies to redress all that appellees complain of, but in addition has provided for judicial review for cases where the taxpayer feels himself aggrieved by the final action of the administrative boards.

Curtis v. Pound, 34 S. D. 628-632.

Milne v. McKinnon, 32 S. D. 627.

Revised Code 1919, Sec. 8462, 8459, 8469.

By way of introduction, it was affirmatively pleaded there are special tribunals that have not yet acted in the premises and that therefore the Federal Court has no jurisdiction (R. 26, 27; M. 25; N. 25; O. 26; S. 24; P. 26) — and as said, that is not and cannot be disputed. The Court overruled a motion to dismiss, which asserted:

“The record shows the defendant Board is charged by the law of the State with executing the provisions of its drainage law and has jurisdiction to proceed with respect to the property within said drainage area, including that of the plaintiffs. If there have been any errors in administering said statute law, that does not involve the jurisdiction of said special tribunal. The record shows the apportionment of benefits and assessment to be made as provided by the laws of the State and as applied by the Board was based on its judgment as to values and benefits; that in these cases there is a standard method of apportionment which will probably produce substantial justice generally and the proba-

bility is the parties will be taxed proportionately to each other and all others upon whom benefits are conferred by the method provided and employed, and that probably approximately general results will be produced." (R. 210).

"It is moved to dismiss for the further reason the record shows that notice and opportunity to be heard were given as to the amount or proportion of benefits plaintiffs have received and they have a plain, adequate and speedy remedy at law." (R. 209).

This motion, which had been overruled pro forma (R. 210), was renewed at the close of the plaintiff's cases in chief (R. 254), and again overruled.

Whatever variance there may in fact be between the tentative assessment and the amount of benefits to be received, is to some extent due to the fact that appellees refrained from giving the Board any information they possessed which bore upon and might favorably have affected even the tentative apportionment, to say nothing of affecting it when equalization would be entered upon. It is in testimony without dispute that the Board felt the tentative apportionment might not be what the actual benefit to be received was because, for one thing, no equalization herein was permitted and because appellees at no time appeared before the Board and helped it by presenting their views on that subject. (R. 155, 156).

In such circumstances, the only duty of the Board was to exercise an informed and honest judgment in fixing the values for the purposes of taxation. — *Southern Railway Company v. Watts, et al*, 260 U. S. 519, 43 Sup. Ct. Rep. 196.

We will assume for the purposes of present statement that the Board did act honestly and used all due care. Indeed, there is an abundance of testimony that this care was used. For one place, see Pages 155, 156, Rock Island transcript.

No appeal was taken from the order of establishment or from any other act of the Board. (R. 250, 251).

"The ultimate test is that there be some tribunal specially vested by statute with the power of equalization, which power it may assert at the instance of any one aggrieved." *First National Bank vs. Board*, 264 U. S. 454, 44 Sup. Ct. Rep. at 387.

This brings us to what powers of redress the statutes of South Dakota provided. We submit they are broad enough to afford redress for all that appellees complain of, and provide adequate judicial review where the taxpayer feels himself aggrieved by the final judgment of the administrative tribunals provided by statute. We submit in addition there is a presumption that any just grievance would have been redressed by these administrative tribunals.

We concede, of course, there was no obligation to resort to these tribunals if they lack the power to proceed with a drainage project, including lack of power to assess and levy. — *Ward v. Alsup*, (Tenn.) 46 S. W. at 576. We concede also that if some fraud had prevented resort to these administrative bodies, failure to resort to them would not be a bar to these suits. But we have to say it cannot seriously be questioned that the appellant Board did acquire jurisdiction as to this drainage project and that there is no pretense that fraud or anything else prevented resort to those tribunals.

It is not only shown by this record and the exhibiting of the South Dakota statutes that the Board had full jurisdiction, but the highest Court of the State had before it the very drainage project, and it was contended the Board had not acquired jurisdiction. The Court declared that jurisdiction had been duly acquired. True, the constitutionality of the law under which the project was carried out was not challenged, but acquisition of jurisdiction was. From the decision of the Supreme Court of South Dakota a writ of error was

taken to this Court and same has since been dismissed. — *Gilseth v. Risty*, 46 S. D. 374.

In the *Gilseth* case it is stressed by the Supreme Court of South Dakota that there was no appeal from the order of establishment, and that therefore injunction would not lie to stop the carrying out the work contemplated by the petition.

It is true the Supreme Court also found that *Gilseth* was estopped among other things by delay in instituting his suit, but that was a pure cumulative holding, and the slightest examination of the opinion will disclose there was no thought of resting the decision on this estoppel, and that the main purpose of the decision was to settle whether or not the ditch establishment and the proceedings of the Board were valid, and on jurisdiction. And if it were the fact that the decision on jurisdiction and that on estoppel were of equal rank, it would not detract anything from the binding force of either.

In *First National Bank v. Board*, 264 U. S. 455, 44 Sup. Ct. Rep. at 387, it was contended that the decision in a certain case turned upon the point that plaintiff had an adequate remedy at law, and not that it had lost its right by neglecting to seek an administrative remedy, and the Court says:

"It is true the court after the statement quoted above proceeds to say that plaintiff can not have relief in equity, but this seems to be put forth as an independent ground for affirming the judgment below. It follows the unqualified statement that plaintiff, having refrained from seeking the administrative relief open to it, 'may not now complain'." It introduces the next following, with the words

"But apart from this":

"It is not suggested that in so doing the requirement, already broadly recognized, that administrative remedies must be exhausted as a necessary pre-requisite to a judicial challenge of the tax, could be dispensed with; and, accepting the decision of

the state court that such remedies were in fact open and available under the Colorado statutes, it could not be dispensed with".

A decision denying the force of an objection to a statute which is raised by the record and argued by counsel is not *dictum*, because the statute is held invalid on other grounds.

Carstairs v. Cohran, 95 Ind. 488; affirmed 193 U. S. 10.

It is said in 15 Corpus Juris, 952:

"This is so even though by reason of other points in the case the result reached might have been the same if the Court had held, on the particular point, otherwise than it did. An adjudication on any points within the issue presented by the the case cannot be considered a *dictum*."

"Accordingly, a point expressly decided does not lose its value as precedent because the disposition of the case is based upon other grounds." — Citing cases in the Supreme Court of the United States, Federal Courts, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Tennessee, Washington, and England.

It is said in 15 Corpus Juris, 953:

"Where a case presents two or more points, any one of which is sufficient to determine the court issue, but the court actually decides on such points, the case is an authoritative precedent as to every point decided and none of such points can be regarded as having merely the status of a *dictum*."

Supported by citations of the Supreme Court of the United States, Federal Courts, California, Iowa, New York, Oregon, Tennessee, Texas, Washington, and Wisconsin.

"Though both were grounds of decision, to-wit, that the decision was not based alone on actual

knowledge of what property was intended to be taxed but upon the sufficiency of a description to identify the land in connection with the notice given to appellant — this does not constitute *dictum*."

Ontario v. Wilfong, 233 U. S. 543, 32 Sup. Ct. Rep. at 333, 334.

"Where an appellate court places its decision on two or more distinct grounds, each is as much an authoritative determination as the other, and neither can be disregarded as *dictum*."

King v. Pauly, 159 (Calif.) 549.

"Where a decision is based on two individual lines of reasoning, neither one is a *dictum*."

Pugh v. Mozley, 104 Calif. 374.

"It cannot be said that a case is not authority on one point because, although that point was properly presented and decided, in the regular course of consideration of the cause, something else was found in the end which disposed of the whole matter."

Railroad Co. v. Schutte, 103 U. S. at 119.

"The case is of equal authority upon each of two distinct and sufficient grounds upon which an appellate court rests its affirmance of a judgment although only one of those grounds was considered in the court below."

Union Pacific v. Mason City Ry., 199 U. S. 160, 26 Sup. Ct. Rep. 19.

3.

We recur to what grievances the board of equalization could under the law correct.

Relief could be given as to the finding on any matter alleged in the petition seeking establishment. — *People v. Hagar*, 52 Calif. 183, citing *Freeman Judgments*, Section 523; *Bigelow, Estop.* page 142; *Ward v. Alsup*,

(Tenn.) 46 S. W. at 575, 576; such board has "ample power to pass upon and rectify their individual grievances." — *Idem*.

The trial Judge held there was notice and opportunity to try out why the proposed drainage system should not be established and constructed. (M. 77).

The board had power to pass on whether the assessment district was of proper extent — *Hennessey v. Douglas County*, (Wis.) 74 N. W. 985; there was power to determine whether the lands of a given owner should be included within the district. The trial Judge so held (M. 76), — the board had power to pass upon whether the proposed assessment was valid and just. (M. 82, 83). That is the holding of *Londoner v. Denver*, 210 U. S. at 379, and of *Farncomb v. Denver*, 252 U. S. 7, 40 Sup. Ct. at 272, and of *McGregor v. Hogan*, 263 U. S. 234 at 238, 44 Sup. Ct. at 52.

He held the board had power to pass upon whether there was the right to tax at all. To pass upon what the total tax should be; he so held on the authority of *Soliah v. Drain Commissioners*, 222 U. S. 522; 13 Sup. Ct. 103, and *Paulson v. Portland*, 149 U. S. 30; 13 Sup. Ct. 750. (M. 81). There was power to pass upon what the amount of each owner's assessment should be. — *Londoner v. Denver*, 210 U. S. 379; *McGregor v. Hogan*, 263 U. S. 234, 44 Sup. Ct. at 51. To determine whether the assessment is unjust. — *Petoskey v. City*, (Mich.) 127 N. W. 345; *Michigan Bank v. City*, 107 Mich. 246. Power to determine whether property has been improperly assessed. — *First National Bank v. Board*, 264 U. S. 450, 44 Sup. Ct. at 386, 387. Whether the assessment is improper. — *First National Bank v. Board*, 264 U. S. 450, 44 Sup. Ct. at 386, 387; *Ward v. Alsup*, (Tenn.) 46 S. W. 575. Whether the assessment is illegal. — *Ward v. Alsup*, (Tenn.) 46 S. W. 575; or is unfair. — *First National Bank v. Board*, 264 U. S. 450, 44 Sup. Ct. at 386, 387. The trial Judge ruled the board had power to determine what the proportion of benefits should be after equalization. (M. 78). There was power to determine

whether the assessment was excessive. — *Southern Railway v. Watts*, 260 U. S. 519, 43 Sup. Ct. at 195; *Ward v. Alsup*, (Tenn.) 46 S. W. 575. Whether there had been an excessive assessment through overvaluation. — *Stanley v. County*, 121 U. S. 535, 7 Sup. Ct. at 1238. Whether it was illegally excessive. — *Idem*, at 1239. Whether it was irregular and excessive. — *Ward v. Alsup*, (Tenn.) 46 S. W. 575. Whether it was unequal and excessive. — *Idem; Township v. Rose*, (Mich.) 55 N. W. at 928. Whether the assessment was discriminatory by means of overvaluation. — *Keokuk v. Salm*, 258 U. S. 122, 42 Sup. Ct. at 207, 208. — And in such case the board of review must have the claim presented. — *Idem*, at 208. And relief in equity depends upon having sought correction from this board and having failed to secure redress. — *Idem*. This board has power to determine whether there has been a willful disregard of law requiring uniformity in the valuation of property for taxation. — *Western Union v. Missouri*, 190 U. S. 412, 23 Sup. Ct. at 734. And where the power that this board has is given to a county court then in suit in that court it may be determined whether the assessment was or was not deliberately or fraudulently discriminatory. — *Keokuk v. Salm*, 258 U. S. 122, 42 Sup. Ct. at 208. There is power to determine whether the general rule of equality and uniformity of taxation required by constitutional or statutory provisions has been disregarded. — *Stanley v. County*, 121 U. S. 535, 7 Sup. Ct. at 1239; *Western Union v. Missouri*, 190 U. S. 412, 23 Sup. Ct. at 734 — wherein it is held that the action of such board cannot in this regard be collaterally attacked because the proceeding is *quasi* judicial. Without submitting to the board one may not even complain that the assessment is unconstitutional. — *Milheim v. Moffat*, 262 U. S. 710, at 723, 43 Sup. Ct. at 699. It may pass upon what proportion of benefits should be put upon any particular owner. The trial Judge so held on the authority of *Paulson v. Portland*, 149 U. S. 30, and of *Soliah v. Drain Commissioners*, 222 U. S. 522, 13 Sup. Ct. 103. (M. 79, 81), (82). That is the holding of *Spencer v. Merchant*,

125 U. S. 345, 8 Sup. Ct. 921. There is power to determine whether the proposal will be a public benefit and whether land included should be found to be benefited. So ruled the trial court on the authority of *Soliah v. Drain Commissioners*, 222 U. S. 522, 13 Sup. Ct. 103, and *Paulson v. Portland*, 149 U. S. 30, 13 Sup. Ct. 750. (M. 81). It ruled a hearing was provided wherein the owner might contest the amounts of the benefits or even urge that none are derived. (M. 79). — *Hennessey v. Douglas County*, (Wis.) 74 N. W. 985. There is power to determine whether there is any benefit. — *People v. Hagar*, 52 Calif. at 182, 183, citing Freeman Judgments, Section 523; *Bigelow, Estop.* page 142 — *Milne v. McKinnon*, 32 S. D. 627. The board of equalization can give relief against arbitrariness of assessment. — *Milheim v. Moffat*, 262 U. S. 710, 43 Sup. Ct. at 698. The highest court of South Dakota holds in the *Milne* case, *supra*, that if this is honestly determined the only review is on appeal, and it may not be obtained in a suit in equity to restrain the collection of the assessment. The trial court held there was provision for having the board of equalization determine whether the benefits will or will not exceed assessment. (M. 76). The board of equalization may review whether the property has been fraudulently assessed. — *First National Bank v. Board*, 264 U. S. 450, at 455, 44 Sup. Ct. at 387. Of course it is true that some kinds of fraud excuse submitting to this statutory board. — *Ward v. Alsup*, (Tenn.) 46 S. W. 575, 576. But that must be the same kind of fraud that will set aside a decree, that is, it must appear that the fraud charged prevented the complaining party from making full and fair presentation of his side. — *Toledo Scale Co. v. Scale Company*, 261 U. S. 399 at 423, 43 Sup. Ct. at 464. There is of course no claim of such fraud, or indeed of any fraud. And the Supreme Court of South Dakota held in the *Gilseth* case that there was none, 46 S. D. 374. There is this power of review even where there is provision for paying under protest and recovering back. — *Ward v. Alsup*, (Tenn.) 46 S. W. 575. And no objection to unconstitutionality may be

raised where the board of equalization is ignored. — *Milheim v. Moffat*, 262 U. S. 710 at 723, 43 Sup. Ct. at 699.

What it all comes to is that making no complaint before the reviewing boards provided by law amounts to an admission that the action of the assessing board was correct. — *Hinds v. Township*, (Mich.) 65 N. W. at 546; that if there be no resort to the board of equalization collateral attack on the action of the assessing board will not lie because such action is *quasi* judicial. — *Stanley v. County*, 121 U. S. 535, 7 Sup. Ct. 1239. The *Ward* case (Tenn.) 46 S. W. 575, approves the statement of Cooley on taxation that "the statutory remedy of equalization was supposed to be adequate to all the requirements of justice and the party's folly if he fails to avail himself of it". If he fails to avail himself of the power given the board of equalization to pass all complaints against tentative assessment he has according to the *Milheim* case, *supra*, no sufficient ground of complaint including even the complaint that the assessment is unconstitutional, and having failed to object to a tentative ad valorem assessment adopted by the commission, failure to seek modification or correction before the board of equalization before the tentative basis has been finally adopted, left the party with no sufficient ground of complaint. — *Milheim v. Moffat*, 262 U. S. 710 at 723, 43 Sup. Ct. at 699.

It is the inevitable implication of the opinion of the Circuit Court of Appeals that the absence of benefits will justify injunctive relief. (R. 263).

But as is said in *First National Bank v. Board*, 264 U. S. 450 at 545, 44 Sup. Ct. at 387:

"We cannot assume that if application had been made to the commission, proper relief would not have been accorded by that body in view of the

statutory authority to receive complaints and examine into all cases where it is alleged that property has been fraudulently improperly or unfairly assessed".

"The fact, 'that such remedy were in fact available is controlling here'."

"The question whether an assessment is excessive is not for the courts to try and the board of review is the only tribunal to try and determine that question." — *Township v. Rose*, (Mich.) 55 N. W. 928.

The Supreme Court of South Dakota said in *Bagley v. Butler*, 24 S. D. 429:

"When a party whose property though assessed at less than its value is assessed much higher than that of other taxpayers, shall have requested the several boards to equalize taxes in the manner fixed by statute, to-wit, by raising the assessment of all property to its actual value — and such board refuses or fails to do their clear duty under the law, then, and only then, let such party apply to the courts for relief".

"Error if any in the method of assessing benefits for the construction of a drainage ditch by which a wrong result may have been reached is a matter to be considered on appeal from the determination of the board levying the assessment, and not a suit to restrain its collection."

Milne v. McKinnon, (S. D.) 144 N. W. 117, 32 S. D. 627.

"It follows that if the commissioners exceeded their jurisdiction in the length of the ditch and size of tiling, it's only effect so far as appellants were concerned was to increase the amount assessed against them above the amount that it should have assessed. This is a matter which should have been settled at the time of the assessment of benefits and

expenses of construction and appellant's remedy for an unjust or unwarranted assessment was through an appeal to the Circuit Court from such an assessment." — *Curtiss v. Pound*, 34 S. D. 628-633.

Where there is a conflict as to benefits it is enough for the complainant that there is such conflict especially where the assessing board has made personal inspection. — *Pittsburg Railway v. Backus*, 154 U. S. 421, 14 Sup. Ct. at 1120, 1121. And in that case this court said:

"Is testimony that the value placed by the board was excessive together with testimony that portions of the road outside of the state were of largely greater value than any similar length of road within the state, unaccompanied with evidence that the board reached the valuation by simply dividing the total value of the company's property on a mileage basis, or that it failed to take into consideration the fact of such excessive value of portions outside the state, sufficient to impeach its determination? This question must be answered in the negative. No determination of a special board, charged under the law with the duty of placing a value upon property, can be successfully impeached by such meager testimony."

IX.

THESE SUITS WERE PREMATURE.

The trial Judge says in his opinion that under the South Dakota statutes there may not even be an assessment until after equalization, and the injunction stopped the making of any assessment. (M. 78). The opinion declares further that no assessment can be spread by the auditor until the benefits are finally fixed. (M. 78). Section 8463 of the South Dakota Revised Statutes obviously makes the first apportionment of benefits tentative and subject to the later equalization. And Section 8464 provides that no assessment shall be made until after the equalization has been completed. Whatever may be the law as to the right to have injunction where a tax has been finally fixed and is sought to be enforced surely there is nothing to enjoin when it is not even known what amount the tax will finally be. The Circuit Court of Appeals concedes that when the suits were brought it was not known what the final benefit apportionment would be, but it avoids this with the rather remarkable statement that the suits were not premature since the total expenditure was known and that, therefore, the amount of the threatened assessment was merely a matter of mathematical deduction. (R. 262). The trouble is that knowing what the total is that must be raised by taxation does not give the slightest basis for ascertaining what part of the total a given property owner must bear, or for ascertaining what his share of contribution will be after equalization.

"An attack which seeks relief 'against anticipated injury consequent upon anticipated assessment, before the assessment was completed' is premature."

Western Union v. Howe, (C. C. A.) 180 Fed. at 53, 54.

As is well said in *Western Union v. Howe*, (C. C. A.) 180 Fed. at 53, 54, the effect of an injunction obtain-

ed to relieve against anticipated injury consequent upon anticipated fraudulent assessment, before the assessment is completed, is to take away from the tax commission all right to exercise discretion and judgment in arriving at a fixed and proper valuation — that it is not permitted to bring such injunction suit “before the board had an opportunity to complete the exercise of its *quasi* judicial discretion by equalizing the various assessments throughout the state and completing the assessment of this property” and that therefore “the result is that this suit was premature”.

X.

ASSUMING FOR THE SAKE OF ARGUMENT A SUFFICIENT AMOUNT IN CONTROVERSY AND OTHER ELEMENTS REQUIRED TO GIVE THE FEDERAL COURT JURISDICTION, IT ERRED IN ENTERTAINING THE CAUSES ON ITS CHANCERY SIDE.

1.

It cannot be seriously questioned, and the testimony shows without dispute, that these appellees owed contribution to this drainage project in *some* amount. They tendered nothing. This fact was pleaded as constituting a waiver of the right to have any relief. We need not at this time go so far as that. It suffices to say that this failure to offer what at all events was due is a bar to relief in equity. — *City v. Hall*, 19 S. D. 663, 104 N. W. 470. Even where over-valuation has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory direction and operates unequally on a large class of individuals or corporations the party aggrieved has no right to restrain the collection of the assessment unless he pays or tenders what is admitted to be due. — *Stanley v. County*, 121 U. S. 535, 7 Sup. Ct. at 1239.

2.

AS TO THE CLAIM THAT THE PLAINTIFFS HAVE NO ADE-
QUATE REMEDY AT LAW.

As required by law, the defendants raised in the trial court an issue on this allegation and averred affirmatively that there was an adequate remedy. (R. 23; N. 22; S. 20; P. 23; O. 22; M. 22).

The Circuit Court of Appeals declares that appellees did not have an adequate remedy at law. (R. 257). This is so if there was no remedy at law which was as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity; one as complete, efficient and practicable as the equitable remedy and as efficient both as to final relief and mode of obtaining it. We concede there must be an adequate remedy on the law side of the federal court and that it does not suffice there is such remedy in the state courts. Our contention is that there *was* such remedy on the law side of the federal court.

It was ruled below that the board were naked trespassers because the alleged new ditch project was in law never in existence. (M. 84, 89, 90; R. 255, 256). Both the trial court and the Circuit Court of Appeals base this ruling, for one thing on the ground that the proceeding should have been dealt with under statutes governing the abandonment of existing drainage systems and that the board acted without authority because it did not follow those statutes.

The Circuit Court of Appeals found an exception to the general rule governing equity jurisdiction in the fact that the proceedings of the board were without authority. (R. 252, 253). The trial court held that though the board was a mere trespasser the plaintiffs could get no relief on the law side of the federal court. (M. 83). And indicates that such a distinction is made in *Milheim's* case, 262 U. S. 710; 43 Sup. Ct. 694. (R. 261, 262). We are unable to find such a distinction drawn

in that decision. There must of necessity be a remedy on the law side for resisting a non-constitutional tax, or a tax invalid for any other reason. For it has been held that the trespass resulting from proceedings to enforce an unconstitutional tax cannot be restricted by injunction unless irreparable injury or other ground for equitable interposition is shown to exist. — *Shelton v. Platte*, 139 U. S. 591, 11 Sup. Ct. 649. It is said in *Boise Company v. Boise City*, 213 U. S. 276; 29 Sup. Ct. 427:

“It is obvious that the rights of which the company seeks to avail itself are rights cognizable in a court of law, and not rights created only by the principles of equity. The sum of the company’s contentions is that the imposition of the license fee was illegal, unconstitutional and void; all these contentions are open in a court of law. As complete as inequity.” — *Walla Walla*, 19 Sup. Ct. Rep. 77.

It is held in *Dows v. Chicago*, 11 Wall., 80, that no relief may be had in equity against an effort to tax which because of invalidity of the tax amounts to a common trespass.

Surely, one is not without *any* remedy against such a tax, and since it is not to be had in equity it must of necessity exist at law.

In the *Shelton* case, 139 U. S. 591, 11 Sup. Ct. 648, 649, it was claimed for *Allen v. Railway*, 114 U. S. 311, *Osborn v. Bank*, 9 Wheat. 738, *Cummings v. Bank*, 101 U. S. 153, and *Dodge v. Wolsey*, 18 How. 331, that a court of equity has jurisdiction to restrain a collection of a tax when same is wholly illegal and void. But the court says that in those cases the jurisdiction will be found to have rested on grounds other than merely the unconstitutionality of the taxes involved.

And it is held in the *Shelton* case, 139 U. S. 591, 11 Sup. Ct. 647, if the tax was illegal the taxpayer had, for one thing, the right to prosecute for damages — an action that of course can be entertained on the law side of the federal court.

3.

In *Shelton v. Platte*, 139 U. S. 591, 11 Sup. Ct. 648, it is ruled an allegation is a mere matter of inference which recites that if seizure be made by the sheriff it will greatly embarrass the plaintiff in the conduct of its business and will subject it to heavy loss and damage and the public served by it to great loss and inconvenience. The allegations at bar are in worse case. It is said that the threatening apportionment of benefits will cause a multiplicity of suits. (S. 13, 14; N. 13, 14; P. 14, 15; R. 15; O. 15, 16; M. 25). This is denied. (M. 22, 23; R. 23, 24; O. 23; N. 22, 23; S. 21; P. 23, 24). Next, that said apportionment will cast a cloud on the title of the appellee to their real property — and no appellee, other than the Power Company, has any real property which may be seized or have a lien fastened upon it. (S. 13, 14; N. 13, 14; P. 14, 15; R. 15; O. 15, 16; M. 15). Next, if said apportionment is carried out the plaintiff will suffer immediate and irreparable injury — how, is not stated. (S. 13, 14; N. 13, 14; P. 14, 15; R. 15; O. 15, 16; M. 15). Finally, if said apportionment is carried out plaintiff has no plain, speedy, and adequate remedy at law. (S. 13, 14; N. 13, 14; P. 14, 15; R. 15; O. 15, 16; M. 15). Defendants plead in bar that plaintiff does have such remedy. (M. 22, 23; R. 23, 24; O. 23; N. 22, 23; S. 21; P. 23, 24). They plead further that the bill states no matter of equity entitling plaintiff to the relief prayed for because it has such remedy at law. (M. 22; P. 23; S. 20; O. 22; N. 22; R. 23). Then follow certain pleas in avoidance. First, that plaintiffs are not entitled to the aid of a court of equity because they have neglected and refused to tender the amount of actual benefits received. (M. 29; O. 22). It is held in the case of *Milheim*, 262 U. S. 710, 43 Sup. Ct. 698, that appellees did have an adequate remedy at law because of the provisions for contesting the apportionment; to the same effect is *Indiana Manufacturing Co. v. Koehne*, 188 U. S. 681; 23 Sup. Ct. 452.

In *Union Pacific v. Commissioners*, (C. C. A.) 217

Fed. 456, it was urged there was no adequate remedy at law in such a case as this because injunction "could be issued in a shorter time than would be necessary to pay the taxes and begin an action at law and prosecute to judgment for the recovery of the money". The court said, "but if this reasoning is sound the unlawful resort to equity becomes the very ground of equitable jurisdiction", — and, "if the position were sound every decision of the Supreme Court reversing a decree in equity because the remedy at law was adequate, would be wrong." And following the case of *Buzzard v. Houston*, 199 U. S. 347, that Section 723, Revised Statutes, can be given effect in no other way than by the dismissal of a suit brought in violation of its provisions.

4.

There is great and proper reluctance on part of the federal courts to interfere with the collection of taxes.

"The evil caused by suits in equity to restrain the collection of taxes is grave and has often been set forth by the courts".

Union Pacific v. Commissioners, (C. C. A.)
217 Fed. 543.

It is said in *Shelton v. Platte*, 139 U. S. 591, 11 Sup. Ct. 648, that legislation restricting the issuance of such injunction has been called for by the embarrassment resulting from the improvident employment of the writ in arresting the collection of the public revenue, and that resort to the court of chancery ought not to be interposed in that direction, except where resort to that court is grounded upon the settled principles which govern its jurisdiction. In *Boise v. Boise*, 213 U. S. 276, 29 Sup. Ct. 428, it is held that while the state is at liberty to permit injunctions resisting the collection of taxes, "very different considerations arise where courts of a different though paramount sovereignty impose in the same manner and for the same reason". — And that "the decisions of this court show a reluctance to interfere in

all cases where the federal rights of the persons could otherwise be preserved unimpaired." Upon this principle is grounded the declaration of the Circuit Court of Appeals in the case at bar that the right to establish relief must be clear where it is sought to restrain the collection of a state tax. (R. 259).

The Circuit Court of Appeals holds that though equalization of benefits is provided, as the matter stood when the suits were brought each appellee was threatened with levying of a tax for more than the jurisdictional amount. (R. 259, 263). Surely, this asserts no more than the threat of a illegal tax. — *Union Pacific v. Cheyenne*, 113 U. S. 516, 525, 526, approves the statement of Judge Cooley that "the illegality of the tax alone, or the threat to sell property for its satisfaction cannot of themselves furnish any ground for equitable interposition". Indeed, though the Circuit Court disregards it, it expressly approves of said text. (R. 259, 261). And does so on the authority of *Union Pacific v. Cheyenne*, *Supra*, and of *Hannewinkle v. Georgetown*, 15 Wall, 547, 548. (R. 262, 263).

We show elsewhere that the federal court has no jurisdiction to interfere by injunction against the collection of what is an excessive tax. Under all the undisputed testimony it is not open to challenge that the most which is sought to be restrained is the possibility that an excessive tax may ultimately be collected. (R. 159, 177, 196, 200, 241).

It is perhaps made as clear what equity does not have jurisdiction of by the decisions which find that equity did have.

In the *Ohio Tax* cases, *v. Dittey*, 232 U. S. 576, 34 Sup. Ct. 374, there was involved removing a lien that constituted a cloud. In *Tyler v. Savage*, 143 U. S. 79, 12 Sup. Ct. 345, the relief sought was discovery and discovery was warranted. So of *Sullivan v. Railroad*, 94 U.

S. 807. In *McMullen v. Strother*, 136 Fed. 301, accounting was sought.

Equitable jurisdiction was upheld where the ingredients to support the jurisdiction were discovery, accounting, fraud, and misrepresentation. — *Jones v. Bolles*, 9 Wall, 364, 369. In *United States Insurance Co. v. Cable*, 98 Fed. 763, the cancellation of policies was involved. In *Hopkins v. Walker*, 244 U. S. 486, 37 Sup. Ct. 712, the cancellation of a location certificate which was a cloud on title, and where it further appeared that without the interposition of the court the plaintiff might suffer injury. In *Coler v. Board*, 89 Fed. 260, there was an attempt to impress a trust. In *Cummings v. National Bank*, 101 U. S. 153, the plaintiff had standing as a fiduciary and trustee seeking to protect his trust. In *Boyce v. Grundy*, 3 Pet. 215, and in *Green v. Railway*, 244 U. S. 522, 37 Sup. Ct. 682, there was present the element that if the chancery court dismissed the suitor the law court would only give him partial relief thus affirming the rule that where equity can attach at all it will give complete relief. In *Shelton v. Platte*, 139 U. S. 591, 11 Sup. Ct. 649, there was in fact a threat of irreparable injury and of multiplicity of suits. And in *McConihay v. Wright*, 121 U. S. 201, 7 Sup. Ct. 941, where the plaintiff sought to compel defendant to assert what right and title in reality he claimed, the court held that equity had jurisdiction because such suit afforded a better remedy than would ejectment.

5.

As before said the Circuit Court of Appeals agrees that mere illegality of a tax will not base the chancery jurisdiction. (R. 261, 262, 263). That is thoroughly settled by the decisions to which the Court refers.

"A federal court is not vested with jurisdiction of a suit in equity to enjoin the collection of a state tax because the case is one arising under the constitution and laws of the United States within the meaning of the judiciary act of Aug. 13, 1888,

(25 Stat. at L. 433, Chap. 866) Sec. 1, unless there is apparent some ground of equitable jurisdiction recognized by the federal courts."

Indiana Mfg. Co. v. Koehne, 188 U. S. 681;
23 Sup. Ct. 452.

There must be more than that the tax is illegal and unconstitutional. It is not enough that what is being done and threatened, constitutes a common trespass. — *Dows v. Chicago*, 11 Wall. 180. It is said in *Boise v. Boise*, 213 U. S. 276, 29 Sup. Ct. 429, that the books do not disclose a case in which chancery interfered merely because the enforcement of an illegal or unconstitutional tax was threatened.

The Circuit Court of Appeals recognizes its holding can be supported only by finding that in addition to illegal taxation some of the recognized heads of the chancery jurisdiction were also involved. (R. 259). So all that needs argument now is whether or not finding the existence of these chancery ingredients is warranted by the record.

AS TO FRAUD.

It is more than doubtful whether any fraud is charged. The only claim that there is such charge must rest on allegations (and to say the least, it is doubtful if there are any), that the board only pretended to be establishing a new and independent drainage system and was in fact using that pretense for obtaining money wherewith to repair existing ditches. We say elsewhere that the charge is unfounded in fact; that objections on that score could and should have been made to the assessing board or before the board of qualization — and we show in another place that this very question was raised in the Supreme Court of South Dakota as to the project at bar and it found affirmatively upon construction of the statutes of the state that this was a new and independent project. Three of the appellees concede this to be so. In *Union Pacific v. Commissioners*, (C. C. A.) 217 Fed. 544, it was charged that the taxing, officers

were guilty of fraud in the assessment of plaintiff's property and claimed that such fraud gave equity jurisdiction. The court said it was by no means true that for all alleged fraud equity may be resorted to for redress; — that that was not the case when a legal remedy has been given by the statute which is a substitute for remedy in equity; — that it is immaterial what the cause of invalidity is and that even if it consists of unconstitutionality or fraud it still effects no more than to make the tax invalid, which alone is not a ground of equitable jurisdiction. It is only where correction has been sought from the board of review and there has been a failure to secure redress that an overvaluation that is fraudulently discriminatory will open the doors of the court of equity. — *Keokuk v. Salm*, 258 U. S. 122, 42 Sup. Ct. 207. This was held, too, where a corporation was assessed on the basis of 75% of actual values while taxable property in general was assessed systematically and intentionally at not more than 52%. — *Greene v. Railway*, 244 U. S. 522, 37 Sup. Ct. 675.

In *Boyce v. Grundy*, 3 Peters, 213, there *was* a sufficient charge of fraud:

"The bill was filed to obtain the rescission of an agreement entered into on the 3d of July, 1918, between James Boyce, the appellant's testator and deviser, and the complainants, for the sale of a tract of land lying on the Homocito river, in the state of Mississippi. The grounds set forth in the bill are fraudulent misrepresentations: 1. As to the testator's title to the land. 2. As to the locality of the land. 3. As to the liability of the lands to inundation. 4. As to the general description of the character and quality of part of the land, not examined by complainant."

6.

AS TO MULTIPLICITY OF SUITS THREATENED.

It does not appear any are threatened. One set of

suits is brought and is pending. These will settle the rights of the parties and there is therefore no need for any further suits. *Boise v. Boise*, 213 U. S. 276; 29 Sup. Ct. Rep. at 430.

Where the multiplicity to be feared consists of repetitions by the same person against the plaintiff for causes of action arising out of the same facts and legal principles, a Court of Equity ought not to interfere on that ground unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation. — *Idem*.

It is ruled in the *Boise* case, 213 U. S. 276, and in *Indiana Company v. Koehne*, 188 U. S. 681, that the doctrine of jurisdiction to prevent a multiplicity of suits has no reference to suits which might be begun by him who asserts multiplicity. Whatever else may threaten, surely there is no possibility of suits against appellees.

Multiplicity cannot successfully be invoked where the statutes give access to the Board of Review, and appeal from the decision of such Boards to the Courts. — *Indiana Company v. Koehne*, 188 U. S. 681; 23 Sup. Ct. Rep. 452.

To the same effect is *Keokuk v. Salm*, 258 U. S. 122, 42 Sup. Ct. Rep. at 208.

In *Union Pacific v. Ryan*, 113 U. S. 516, 5 Sup. Ct. Rep. 606, it was found that in fact a multiplicity of suits was threatened concerning the title of lots, and that there was a cloud which prevented sale.

AS TO IRREPARABLE INJURY.

As seen, there is nothing but naked conclusion in asserting any of the recognized heads of the chancery jurisdiction. It is ruled in *Shelton v. Platte*, 139 U. S. 591; 11 Sup. Ct. Rep. 646, that a bill to restrain the levy of a distress warrant which seeks to collect an alleged illegal tax which bill merely alleges that the property of plaintiff — an express company — is employed in Interstate Commerce, and that the seizure will

greatly embarrass the Company and will result in heavy loss to it and the public it serves — states no ground for equitable interference. A vague allegation will not suffice. — *Boise v. Boise*, 213 U. S. 276; 29 Sup. Ct. Rep. at 429.

AS TO IRREPARABLE INJURY.

We agree with the Circuit Court of Appeals to collect an illegal tax will open the doors of the chancery court if there be involved in addition a threat of irreparable mischief. (R. 259). But here there was no such mischief nor the threat of any which the law recognizes. For a valid law gave opportunity to have it determined whether these appellees shall ever pay any tax. Surely it is not an irreparable mischief such as gives chancery jurisdiction that one might be defeated on resort to lawful tribunals including the right to go to appellate tribunals. Where such remedy exists no case of irreparable injury is made out. — *Keokuk v. Salm*, 258 U. S. 122; 42 Sup. St. Rep. at 208.

All that needs to be said as to *Watson v. Sutherland*, 5 Wall. 74, is that it exhibits an undoubted case of irreparable injury. Injunction was allowed to restrain a creditor who had levied on a miscellaneous stock in retail trade suitable for the then current season and intended to be paid for out of sale. The stock was in possession of a young man recently established in trade, and doing a profitable business. There was allegation that he had conveyed to defeat his creditors. The Court finding there had been no such conveyance held injunction was authorized because the measure of damages at law could not extend beyond the actual injury done, and would not cover loss of trade, destruction of credit and failure of business prospects — commercial ruin, in short.

7.

NO CLOUD ON TITLE OF RAILROAD OR CITY PROPERTY.

The Circuit Court of Appeals rules there was such cloud on title by threatened sale as to constitute a grievance entitling plaintiffs to enter a Court of Equity. (R.

259,. We submit that with the exception of the Northern States Power Company there is no possibility of a cloud on title to real estate. As we understand the pleadings, there is not even a claim that as to the appellees a lien against its property might be effected. All we can find on that head are assumptions in each of the lower Courts that such lien would follow assessment. (M. 79, 80, 92).

In *Boise v. Boise*, 213 U. S. 276; 29 Sup. Ct. Rep. 430, it is said that a certain ordinance did not cast a cloud upon the title of the Company or its franchise; that it is not a lien on any of its property; that the only remedy for collection is one at law for the collection of the assessment.

Averment that an assessment of capital stock on franchise constitutes a cloud on title is insufficient to sustain a bill which seeks to enjoin the collection of such tax as illegal, where it contains no allegation that the corporation owns any real property. *Indiana Company v. Koehne*, 188 U. S. 681; 23 Sup. Ct. Rep. 452. It will presently be shown that in no proper sense do either of the appellees other than the Power Company own any real property.

A railroad can not be regarded as mere land, like farm land or building lots; its value depends upon the whole line as a unit to be used as a thoroughfare and means of transportation. One mile or two of its length is almost valueless by itself. — *Union Pacific Ry. v. Ryan*, 113 U. S. 516; 5 Sup. Ct. Rep. at 603.

"Payment of taxes on final assessment against real estate is enforced (as against railroads) in the first instance not by distraint or levy, but by legal proceedings, to-wit, application by the collector to the county court for judgment against the property." — *Keokuk v. Salm*, 258 U. S. 122, 42 Sup. Ct. Rep. 208.

Section 8463 of the Revised Code of South Dakota provides merely that "the proportion of benefits which

any Railroad Company may obtain for its property by such construction shall be fixed and equalized together with the proportion of benefits to tracts of land." This, of course, makes no provision for placing any lien upon any property of railroad corporations.

Section 8464, provides for a notice after equalization and requires the notice to state, among other things, the amount of each assessment, "together with the amount assessed against * * * * the Railroad Company." The notice shall further give the date when the assessment will become delinquent, together with the amount of penalty which will then accrue and the date from which interest will begin to run — still no provision for any lien. But the Section provides further that "the provisions of Chapters 7, 8, 9, Part 9 of this Title shall apply to the enforcement of the lien or drainage assessments so far as such provisions are applicable."

Section 6606, dealing with the subject of how collections are made and enforced is as follows:

"All laws relating to the enforcement of the payment of delinquent taxes shall be applicable to all taxes levied under the provisions of this article, and whenever any taxes levied under the provisions of this article shall become delinquent, the treasurer may proceed to collect the same in the same manner and with the same right and power as a sheriff under execution, except that no process shall be necessary to authorize him to sell engines, cars or any rolling stock for collection of such taxes."

Under this, the tax is assessed against the Railroad Company, as a personal tax, to be enforced by execution against the personal property of the railroad.

It is obvious this deals with nothing but the seizure of personal property. And as before indicated, the statute could not validly go beyond that. The State could not seize upon a few miles of railroad in South Dakota which is a part of a large interstate carrier system and sell those miles. Beyond doubt, such action would be

restrained as an interference with the carrying on of Interstate Commerce.

Section 8463 has, as to cities also a provision for equalizing benefits by the construction of drainage, to highways or otherwise.

Section 8464 provides that "whenever any assessment for drainage * * * has been made against any * * * city * * * as provided in this Chapter, the officers of such * * * city * * * whose duty it is under the law to make the levy of taxes shall at the time of the next annual tax levy after the making of this assessment, make a levy for drainage purposes for such amount as shall be necessary to pay such assessment, which tax shall be collected the same as other taxes." Of course the proposed assessment at bar would not result in any lien upon the property of a city.

In a word, all claim that equity has jurisdiction because of the casting of a cloud or because of a lien either threatened or effected, falls to the ground because the premise is unsound.

Ohio Railway v. Ditty, 232 U. S. 576; 34 Sup. Ct. Rep. 374, is merely a case wherein it was clear that lien was provided to make the tax effective.

So of *Wallace* case, 253 U. S. 66; 40 Sup. Ct. at 436. And *Union Pacific v. Board*, 247 U. S. 282; 38 Sup. Ct. 510.

XI.

THE CONSTITUTION EMPOWERS THE LEGISLATURE TO AUTHORIZE BOARDS LIKE APPELLANT TO ESTABLISH SUCH DRAINAGE PROJECT AS THE ONE AT BAR, AND THE LEGISLATURE HAS AVAILED ITSELF OF THIS POWER AND HAS AUTHORIZED SUCH ESTABLISHMENT.

It was the opinion of each of the lower Courts that appellant Board had no power to establish any drainage project unless it was one for the purpose of draining agricultural lands. (M. 79; R. 257).

It does not seem to be contended, and it cannot well be, that the Constitution of South Dakota does not authorize such a project as the one at bar. What is asserted is that while there is authority for the Legislature to authorize the establishment of such a one, that constitutional provision is not self-executing — in the language of the brief of the appellee Omaha in the Circuit Court of Appeals (30) that the Legislature has never passed an act putting into effect the authority vested in the Legislature to create drainage districts except such as are to drain agricultural lands. According to the trial Judge, while the Constitution has provided for the drainage of agricultural lands and also for the drainage of lands "for any public use", there is no statutory enactment under which drainage districts may be formed for the drainage of lands "for any public use". (M. 93, 94).

As to what the Legislature is authorized to do by the Constitution, there has been construction by the highest Court of the State and it is its holding that the Legislature is empowered to provide for either of two methods in authorizing drainage work. It may give authority to incorporate a drainage district and vest its corporate authorities with power to establish — or it may dispense with this and vest the necessary powers in such bodies as the Board of Commissioners. — *Davidson v. Watertown Tile Company*, (S. D.) 196 N. W. 96.

To like effect is *Tuthill v. McMackin*, 31 S. D. 507.

The Circuit Court of Appeals is of opinion there was no intention to establish a drainage for the purpose of draining agricultural lands. (R. 257). The sole purpose was in fact to drain these lands, and it may be conceded that the method adopted to accomplish this end, was to hasten the flow of the flood water thereby preventing it from ponding back on the lands. The property of the appellees was such as could be used as farm land, if so desired, though it may be conceded that it was not being used for such purpose at the time of the construction of this project. While there is testimony that appellees property has never been and cannot be used for agricultural purposes, one witness for the plaintiff testified in effect that the project did not deal with agricultural lands, excepts to a very limited extent, if at all. (R. 208). And there is testimony that there was no natural reasons why the lands of the plaintiffs might not in whole, or in part at least be used for agricultural purposes. (R. 183, 185, 197). All this, however, is not very important, because we rest this branch of the case on the proposition that the drainage project was for a public use and was authorized even if it was not intended for the drainage of agricultural lands which the constitution had made merely one public use.

The controlling question is whether the legislature has used the power given it by authorizing Boards such as this to establish drainage systems such as this.

It admits of no doubt that the Legislature has so availed itself. All claims to the contrary are based on patent misconception of Section 8462 Revised Statutes. It certainly availed itself of the power which the Constitution has given the Legislature, for said statute authorizes establishment, not only of drainage for draining agricultural lands, but of any drainage system which the board finds conducive to the public health, convenience, or welfare. Indeed, so far from this statute limiting authority to the drainage of agricultural lands, it makes the establishment of systems for that purpose

merely alternative. It provides first, that if the Board finds the drainage proposed conducive to the public health, convenience, or welfare, then it may establish and then continue, or if it finds it necessary or practicable for drainage agricultural lands it may establish a drainage system to accomplish draining such lands.

2.

We are of opinion the Board was authorized to construct such drainage project without any reference to the particular Constitutional provision which has before been referred to.

Tuthill v. McMacken, 31 S. D. 507, so far from holding that the right to drain is limited to the drainage of agricultural lands construes the constitution to provide that one effect of the amendment of it was to make the drainage of agricultural land a public work. The amendment seems to be purely declaratory — to be an attempt to say in terms that the draining of agricultural land is a taking for and engaging in a drainage project for a public use. It needed no exercise of a power given by this particular constitutional provision to authorize the establishment of a drainage project other than one designed to drain farm lands. Authority to engage in such a project exists under the general provision of the South Dakota constitution and the general statutes availing of those provisions. Without reference to this particular amendment those who engaged in drainage projects generally were engaged in a public work for the public use. *Tuthill v. McMacken*, 30 S. D. 507. Without reference to this specific amendment there was authority to engage in works that were for the public use. The matter comes fairly within the rule laid down in *Fallbrook v. Bradley*, 164 U. S. 112; 17 Sup. Ct. Rep. 65, which rules that statutes authorizing drainage of swamp land have frequently been upheld independently of any effect upon the public health, as being reasonable regulation for the general advantage of those who are threatened as owners of a common property.

XII.

THERE IS NEITHER PLEA NOR PROOF OF ANY FRAUD, TO SAY NOTHING OF SUCH FRAUD AS GIVES EQUITY JURISDICTION, AND THE HIGHEST COURT OF THE STATE IN CONSTRUING THE STATUTES OF THE STATE HAS RULED THAT THERE WAS NO FRAUD.

We find ourselves unable to find any allegation of fraud. It seems to have gotten into the cases by declarations of each of the two lower courts, that the project at bar was a mere subterfuge; that a larger sum could be raised for a new drainage project than repairing an existing one, and that the board attempted to obtain the larger sum by pretending it was creating a new system and did this for the purpose of using what was raised in maintaining and repairing an already existing drainage system.

The trial court asserts at considerable length that what was really done was providing money to cure in the existing system defects of construction which were the fault of the appellant board; and that all that was in truth required to be done was to cure these defects in construction. (M. 85, 86, 87, 88, 93). Though this is said, the trial Judge points out forcibly how much more than mere repairing was needed by stating in detail how great was the danger at the time when this project at bar was established and how radical the steps needed to be to avoid this danger. (M. 86, 87, 88). The Circuit Court of Appeals admits the great danger that existed at the time of the establishment. (R. 254).

The Supreme Court of South Dakota ruled as follows:

"It is contended by the appellant that the project contemplated by the petition was not the creation of a new drainage district or a new drainage ditch, but merely to repair a project already in operation, and that, therefore, the board was without authority to proceed."

"But this contention is not tenable. The constitution (Section 6, Article 21) and the statute (Section 8458) gives the board the same authority to repair an old ditch that it does to construct a new one."

"But the two projects were by no means identical. The drainage district involved in this case contains a materially larger area than the combined area of the two old ditches."

Gilseth v. Risty, 46 S. D. 374, 193 N. W. 134.

"No fraud or bad faith on the part of the board has been shown." (135).

In addition, two of the appellees conceded that to be true which the Supreme Court affirms as above set forth. (Brief in Circuit Court of Appeals of Appellee Omaha, 24, 25, 28).

The trial Judge in effect sums his view with the statement that everything that was done merely came to giving the old ditches a new name. (M. 89). In this holding he disregarded that the project was initiated on a petition on which the City of Sioux Falls was one signer and which petition prayed the establishment of a new and enlarged drainage district, and which suggested also the enlargement and improvement of the old ditches, the canalizing of the course of the river and the enlargement of the assessment area by adding some ten sections (R. 42); overlooked, that it cost One Hundred Twenty-seven Thousand and some dollars to construct the old system and over Three Hundred Nine Thousand Dollars to construct the new. (R. 185), (R. 224 to 229), (M. 18). He overlooks his own statement that so great a danger existed as that no mere attempt to repair could meet it. (M. 86, 87, 88). And so does the Circuit Court of Appeals. (R. 254). He overlooked that the old ditch was but forty feet wide at the bottom with a side slope of one and one-half to one (M. 119; R. 159); while the new, is from eighty to one hundred feet wide, for miles (M. 256; R. 165);

overlooks the increased discharge capacity of the new ditch (P. 294; R. 180, 181); the nature and amount of work that was done. One item was that three miles of the original ditch was enlarged to a width of eighty to one hundred feet and that a dike five or six feet high was thrown up along the new ditch (R. 164, 204); overlooks, the size of the new drainage area (R. 179), and that it was increased so as to cover all the land described in the notice of equalization. (R. 19). Overlooks testimony that the effect was to establish a more perfect drainage system with more substantial controlling works and equipment and ditches of more than double the capacity of the old ones. (R. 19). Overlooks testimony that the effect of the canalizing and enlarging and installing wiers, dams, and controlling works and a substantial spillway, made a double and more perfect system of drainage (R. 41); testimony, that the real purpose of the ditch was to take the water from the river in flood time and conduct it to the spillway to prevent overflow from spreading over farm lands (R. 209); that the ditch serves the purpose of a drainage ditch as well as to care for overflow and was put in for the purpose of serving in both respects (R. 237); that through the diking when flood waters backed up on the farm lands to the west these lands were protected (R. 165); that the ditch was so effective as to lower water in wells to a very considerable extent (R. 208, 209); there was overlooked the detailed testimony by the engineer of the board as to how effective the new project was. (R. 236, 237).

The conclusion that merely repairing was the sole purpose is reached by ignoring all which showed that much more than repairing must have been in contemplation. The trial court seem to have been quite impressed by the fact that the board did not follow statutes that dealt with the abandonment of ditch projects or with projects to maintain and repair existing ditches. In other word, it seems to be found it was planned to do nothing but repair because repair statutes were not

acted upon. (M. 88). The Circuit Court of Appeals indulges in the same line of reasoning. (R. 255, 256).

We submit in all confidence there is no warrant for basing the decree below upon anything having so much as even a fraudulent aspect.

XIII.

AS TO DISREGARD OF STATUTORY DIRECTIONS.

The type of complaint on this head is fully exhibited in the statement of matters for consideration. From these we select, that as to action required to be had by resolution no resolution was passed; that the statute direction that the petition be filed was disregarded (ante 32); that the statute requiring petition to be sent to the state engineer was not followed. (Ante 33).

As to complaint that the construction was not on competitive bid (ante 34), the statute authorized what was done. Section 8465 provides that the work shall be let on competitive bids, the board being given the right to reject all bids, — and

“If in the judgment of the board the entire drainage or any part thereof could be constructed for less money than the amount of any bid submitted therefor the board may cause such drainage to be constructed, hire the necessary labor and purchase all necessary materials for such construction, without letting contracts therefor.”

The Board took that view of the situation.

The record shows without dispute that all complaints charging failure to comply with statute are unfounded.

All alleged failure to comply with the statute are foreclosed by the Gilseth case.

“Numerous irregularities on the part of the board were alleged and it may be assumed that the board did in certain instances proceed in an ir-

regular manner, but it is not shown that the board did in any instance exceed the jurisdiction conferred upon it by law."

Gilseth v. Risty, 46 S. D. 374.

"All the irregularities complained of occurred after the board had acquired jurisdiction of the subject-matter". (135).

XIV.

AS TO THE CONTENTION THAT THE STATUTE LAW WAS ADMINISTERED IN AN ARBITRARY AND DISCRIMINATORY MANNER AND THAT THE ASSESSMENT OF BENEFITS WAS WITHOUT A BASIS IN REASON.

We have at the outset the question whether this complaint of arbitrary and discriminatory action includes as well a claim that by such action there was a violation of the Constitution of the United States — a violation of the guaranty of the equal protection of the laws. As to this it is our position that the bills do not assert there was any arbitrary conduct or discrimination in violation of that Constitution. All that is said is that there was arbitrary and discriminatory conduct so that if the apportionment of benefits be made as threatened and as stated in the notice given this "will deny and deprive plaintiff of the equal protection of the laws". (P. 14; O. 15; M. 15; M. 13, 14; R. 15; S. 13). A protest against such conduct must be made upon the ground that it violates the federal constitution. — *Hinds v. Township*, (Mich.) 65 N. W. 545. It is not enough to say that it will deprive of the equal protection of the laws, because the constitution of South Dakota (Art. 6, Sec. 18), has the same guaranty — wherefore, it cannot be told by this plea whether complaint is made of violation of the state constitution or the constitution of the United States. Neither is it clear that either of the lower courts put decision or any part of it on the ground that there had been a denial of the equal protection of the laws

in violation of the federal constitution. In the opinion of the trial Judge it is said there was a higher rate as to appellees, that it was ascertained on a different basis from that employed as to lands, that no direct benefits resulted, that the method was arbitrary and the benefits fanciful. (M. 81, 90). The opinion then enters upon what the appellees claim on this head, to-wit, that the assessment of benefits is arbitrary, unjust, illegal and void; that thereupon they claim that the assessment is such as to result in the property of the plaintiffs bearing more than its share of the burden, though not benefited; that the alleged benefits from this improvement have not been estimated on these properties in accordance with the basis used as to farm lands nor by any standard which will produce approximately general results; that the taxes upon the property of the plaintiffs are based upon some fanciful view of benefits, while farm property is assessed wholly according to its area and position, and that said property is sought to be burdened on a basis so wholly different from that used for ascertaining the contribution demanded from owners of agricultural lands as necessarily to produce manifest inequality. (M. 84).

The Court "suggests in conclusion" that the taxation that is imposed upon each of the plaintiffs:

"Is at much higher rate and upon a different basis than the tax upon land lying within the district. * * * It is further shown that the benefits estimated on the plaintiffs property were upon no standard that would probably produce results approximately the same as those upon the land in the drainage district. Taking for instance, the tax upon the City of Sioux Falls, for its miles of streets, with no pretense that there is any method of taxation or measuring a benefit or a gain that would produce even approximately correct general results when considered with benefits to the lands in the district. Simply a vague, indefinite generality indulged in by the engineer and adopted by the board.

benefits purely fanciful with no substantial basis. Take the railroads, there is no pretense that the basis used had any relation to that used in fixing the value upon the lands in the district. It is admitted that the basis was wholly different from that used for ascertaining the contribution demanded of individual owners, and I find that such difference necessarily produces manifest inequality. There is an entire absence of the equal protection of the law that must be extended to all". (M. 90, 91).

It will be noted it is not said that the Constitution of the United States had been violated.

The Circuit Court of Appeals contents itself with saying the plaintiffs claim that the attempted assessment is arbitrary, unjust and illegal, and constitutes a discrimination so palpably arbitrary as to amount to a denial of the equal protection of the laws. R. 252, 253).

And it declines to pass upon any constitutional questions. We, therefore, repeat there is no complaint or decision that any alleged arbitrary or discriminatory conduct violated the Constitution of the United States.

Be that as it may, if it were asserted the Constitution of the United States had been disregarded that will not avail in this collateral suit because the plaintiffs had full opportunity to object to the method of the proposed taxation and declined to avail themselves of that right.

2.

This brings up the question whether if it be assumed that the federal court had jurisdiction to decide this question it decided rightly. Before entering into this more in detail, we submit the main complaint on this head is that by reason of discrimination the appellees were threatened with an excessive tax, with having to bear more than their just share of the cost of

the drainage project. — And that, too, is a matter they were bound to present to the board of equalization before they could enter either a state court or a federal court. We submit also that the *Gilseth* case settles for this court that nothing arbitrary or discriminatory was done.

Entering now upon the question whether the evidence shows there was arbitrary and discriminatory action, it is a fair statement in the rough that the testimony was in conflict and that it should have been left to the board of equalization to resolve this conflict instead of turning the federal court into a reviewing tribunal.

The District Court ruled that no direct benefits to the property of the appellees within the City are shown. (M. 90, 92).

It cannot be stressed too much that the major premise for all this is utterly lacking. It is difficult to see how it may be found there was discriminatory assessment as between agricultural lands and the property of the appellees when there is neither plea nor proof what these respective properties were worth; or what the assessment would be after equalization. (M. 5).

There is a statement that the project "was designed for the purpose of draining upwards of 20,000 acres of agricultural land", and there is a detailed description of where this land is located. There is no allegation that the drainage district in fact had that many acres; there is not even a suggestion as to the quality of this land or its value. Nor is there allegation as to how much the property of the appellees was worth. What basis is there for holding that there was discrimination between these two classes of property. If the property in lands that was subject to the assessment and the property of the appellees subject to assessment are of the same value, it would not be unreasonable to say it would not be arbitrary to tentatively fix benefits at the same rate, and for that matter, in the same sum.

Passing that, we have affirmative testimony that

all that was done was on careful and honest consideration and all substantially on the same basis. (R. 161, 162, 163, 166, 232, 233, 238, 239). While the trial court said (M. 91) there is no evidence that the Railroad Companies were treated like owners of agricultural lands and that the discrimination is palpable — there was testimony in detail which tended to show that there was no such discrimination and that the method used was not arbitrary. (R. 160, 256).

While the trial Court found there was a method of assessment that would necessarily produce manifest inequality in that farm property was assessed wholly according to its area and position, which was not done as to other properties (M. 84) — there is much testimony there was no discrimination and there is very much there was none against the City, and some that there was. (R. 160, 162, 170, 178, 182, 232, 233, 234, 234, 241, 242, 253, 254, 255, 256, 257, 258, 260, 262, 263, 266).

The Court found the method for assessment was arbitrary and took a fanciful view as to benefits which was not calculated to produce even approximately correct general results. (M. 84).

As to the methods not being arbitrary, much is found. (R. 162, 232, 233, 238, 239, 251). There is testimony that the method used involved great care and consideration, and therefore was not arbitrary. (R. 162, 163, 233, 234). In that connection, it was suggested in evidence that probably the tentative assessment might differ from the actual benefits received but that this could have been in a measure helped if the appellees had not seen fit to make no appearance and to give help by presenting their views. (R. 155, 156, 158).

There is testimony that the property of the appellees was in such position with reference to the river and otherwise as at least to be exposed to danger from flood. (O. 163, 182, 183, 184, 245; R. 169, 170, 171, 191, 192, 239, 240). Testimony, that past floods had

done no substantial damage to the property of any of the appellees. (M. 224, 246, 247; R. 179, 180, 181, 183, 193, 198, 200); that no Power Company property had been flooded since 1900 (N. 244); that the Rock Island has not suffered from even a threat of water damage from January 1, 1913, to June 1, 1920, (R. 181, 182); nor the Milwaukee since 1897. (R. 193). And there is testimony that this is so of practically all the appellees. (R. 177, 179, 189, 183, 189, 191, 194, 200, 103). On the other hand it is testified there was past flood injury. (R. 172, 183, 193, 200). (M. 247).

There is testimony that the project has accomplished nothing that could not have been accomplished at trifling expense by simply abandoning the old ditches and preventing the flow of the water through the bluff and into the river. There is variety of testimony as to why the project is needless. (R. 172, 180, 191, 204, 207). And testimony to the effect that it had done more harm than good. (R. 189, 193, 201, 204). And that no protection against floods was needed. (N. 244, 245; R. 193, 196, 197, 198, 202, 205, 206, 207, 297, 198; O. 196; M. 246, 247) — and that the elevations were too high to need protection against floods. (R. 177, 183, 188, 189, 191, 196, 199).

There was conflict of whether or not the operating expense of railroads was lessened. (R. 163, 168, 171, 172; N. 246).

There was much testimony without any substantial dispute that the Board acted honestly and according to honest judgment so that the most that can be claimed is that there was an honest mistake of judgment. (R. 232, 233, 234, 251, 255, 256, 258, 262). As said in *Embree v. K. C. Dist.*, 240 U. S. 242, 36 Sup. Ct. at 320, it presents a question which is one of opinion and degree. There is testimony that benefits accrued. One illustration is that in the past tracks had been washed out so that trains could not be run for eight or ten days. (M. 33; R. 192). Other instances are given. (R. 190, 200, 202, 241, 242, 243). Another instance is that, be-

fore, well water in the city was often unfit for drinking which was remedied after the project was constructed. (R. 279, 281). There are still other instances. R. 155, 156, 518, 234).

The Schodjt's dam was put in to prevent the water that had broken from the river into the ditch from being diverted; this was done at the request of the appellee Power Company, which had objected to the ditch taking its power; and the diversion was further promoted by the controlling gates at Thompson's. (R. 233).

It was testified that there was no benefit to the Power Company. (P. 197, 198, 295, 296, 297; R. 195, 196, 241, 259, 264). As to this there is conflict. (N. 243, 246; R. 241, 259, 264).

One witness gives it as his opinion that no benefit has resulted to railroad property. (R. 189). Link speaks to the same effect as to benefits to the Power Company plant. (R. 206).

When it is all said and done, there is nothing in all this that excused the appellees from presenting their claims to the Board of Equalization.

As to arbitrary method of assessment see page (5 ante); as to arbitrariness with reference to unit method (ante 45); as to arbitrariness concerning benefits (ante pp. 39 to 44, both inclusive, 46, 47, 48); as to benefits (ante 5), (And 55, 56, 57, 58); as to arbitrariness by discrimination (ante 34); as to discrimination (ante 5, 35 to 39, both inclusive, 44).

A brief on this subject will be presented in the summary that follows.

ESTOPPEL.

Each of the defendants made an affirmative plea of stoppel. These were never met by any denial in pleading. — (See O. 39; M. 34; S. 39; N. 38; P. 38; R. 39). Indeed, we are unable to find that the plea was met at all. It sets out specific conduct. A rough and fairly accurate summary is that the City is estopped because it was a signer on the petition that initiated the project, (M. 30, 31, 32, 33; N. 39; O. 35) — and that its representatives attended some of the proceedings and its commission witnessed some of the work while in progress — and that there is an estoppel by the acts of the railroads in co-operating as to the construction by carrying freight and men for it, and being paid for it. (N. 275, 276, 266; R. 237, 231, 279, 280, 183, 191, 211; S. 245).

The Circuit Court of Appeals says:

“Appellants plead estoppel against all of the appellees, and claim that appellees are not in position to maintain their actions, for the reason that as to some of the railroad companies, the engineering departments have been in close touch with the drainage ditch proceedings; that some of them were assessed for benefits received upon the construction of the original ditches in the same territory, received benefit thereby, and have not protested before the bringing of this action. As to some of the appellees it is claimed that their officers showed interest in the construction work and encouraged the board of commissioners to do the work; that some of the appellees, for instance, the Chicago, Milwaukee & St. Paul Railway Company, hauled men and materials used in the construction work, and stopped trains between stations to unload men and materials.”

“As to the City of Sioux Falls, it is claimed by way of estoppel that under due authority the

mayor and city auditor signed the petition for the project". (R. 264).

It will be seen that the Circuit Court of Appeals points out what, the City did, and then stops; that it recognizes the acts pleaded (and which the undisputed testimony shows were done) and then holds that these acts do not constitute an estoppel because the city and the railroads did not have notice that they were to be affected by the drainage construction or by assessment for its costs. (R. 264).

This holding is undoubtedly in response to an argument made by appellees that under the South Dakota statute no notice was required to be given until the assessment of benefits had been made; that, therefore, up to that time appellees have no knowledge that their property situated outside of the original assessment area of the old ditches is affected by the drainage construction or would be assessed for its costs — and that all the acts upon which an estoppel is claimed were done during the time construction work was going on and long before the making of an assessment of benefits and the publishing of the equalization notice.

All this is a misconception of the record and of the statute law. The pleadings by the appellees demonstrate it is not claimed that no notice was required until the assessment of benefits had been made. The attack was, first, that a notice required by Section 8461 of the Revised Statute to be given earlier than that is not such notice as the persons affected are entitled to have under the Constitution of the United States. The exact complaint is it is too general, for in that, while it requires that notice be given as to the hearing on the petition asking establishment and though it is to describe the route of the proposed drainage and the tract of country likely to be affected thereby, it may do this in general terms, and that this is not helped by the requirement that it describe the separate tracts through which the proposed drainage will pass and to give the names

of the owners thereof as they appear from the records of the office of the Register of Deeds on the date of the filing of the petition, the complaint is that the statute makes no requirement as to who shall be summoned to the hearing except that it shall be "all persons affected by the proposed drainage" and "all persons deeming themselves damaged by the proposed drainage or claiming compensation for the lands proposed to be taken for the drainage". It was said in the printed brief presented to the Circuit Court of Appeals that while the board thus had before it the names of the property owners through whose land the drainage ditch passes neither it nor anyone has the slightest idea of what land will be assessed for the cost of construction because the only notice that is given is this general notice "to all persons affected"; that there cannot be found a case in which a mere general notice directed to "all persons affected" has been held to be sufficient notice to a property owner that his property is to be included within the assessment area; that under the statutes the first time the description of the land "affected" is published is when the notice of equalization is given. In fewer words, in framing their pleadings appellees did not present that they were not estopped because what they saw was done before any notice was required to be or was given. They say nothing as to the estoppel pleaded against them and urge nothing on any head except that while there is to be and was given a notice before they saw what it is claimed estops them, that such notice is violative of the federal constitution.

That this was the issue on this point is made clear by the opinion of the trial Judge:

"Plaintiffs note that this statute except as to property owners through whose property the proposed drainage will pass provides only this general notice, and especially complain that it gives no property owner any notice that his particular tract of land is included in the lands affected by the proposed drainage, and insisted the notice is broad

enough to take in each and every tract of land included in the boundaries of the county in which the drainage project is instituted. It is true that other than this general notice there is no notice whatever given to the property owner that his particular land is affected by the drainage proposition or that he has any interest in it or will be mulched in assessment for benefits by reason thereof. He receives no summons or other notice, either by personal service or by mail. He has, however, the general notice given in the published summons by the commissioners to "all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed". (M. 77).

He then holds that this general notice is constitutional:

"I repeat that under the South Dakota statute there is ample provision for notice to every land owner and an opportunity given to be present at the hearing at which time and place he may assert all objections against the validity and justice of the proposed charge upon his property before the tax is levied and carried by the county auditor as such on the books of his office and made a lien upon the property". (M. 82, 83).

In still other words, there was no issue here on whether certain acts constituted or did not constitute an estoppel; if it be assumed there was such issue, none that there was estoppel because when the acts upon which an estoppel is urged were done no notice had been given which would cause the one sought to be estopped to know that what he saw was something that might affect him — and that the only issue was whether or not a notice which in fact was given and which advised the one sought to be estopped with notice that what he saw affected him, was unconstitutional. — And it is settled by the highest court of the State and binding on

this court that the general notice was sufficient under the statutes of South Dakota. — *State v. Pound*, 34 S. D. 628, 150 N. W. at 287, 288.

There was also a claim by the appellees that if the general notice be assumed to be valid and sufficient yet the statute is fatally defective because while it provides notice the provision does not include any notice to railroad corporations; that as to them no notice at any stage of the proceedings is provided. (See Omaha brief, in the Circuit Court of Appeals, pp. 30, 31, 32).

Finally the Circuit Court of Appeals dismisses the subject of estoppel with the following statement:

"There can certainly be no just claim of estoppel as to those appellees whose property was not within the area of the original drainage ditch No. 1 and No. 2". (R. 264).

We are unable to understand how the fact that one does not have property within the area of the old ditches prevents his being estopped from objecting to the new ditches unless he had no property within the area of the new ditches. We concede for the sake of argument that one who has no property within the new area might not realize that what he saw in the way of ditch construction affected him, and on that premise could not be estopped by what he saw and apparently acquiesced in. But if he had property within the new area and remained silent when he should have spoken the fact that he owned no property within the area of the old ditches certainly does not destroy the estoppel. On this point it cannot be the test whether one did or did not own property in the old drainage ditch territory. Whoever owned property in the new area would or would not be estopped without any reference to where else he did or did not own property.

We submit it was error not to hold that appellees are estopped.

SUMMARY OF ARGUMENT, AND BRIEF.

1.

AMOUNT IN CONTROVERSY.

Ruling on (R. 262, 26).

The amount in dispute must exceed Three Thousand Dollars even if a federal question is presented.

Sec. 991 (Judicial Code, § 24, as amended, Act, Dec. 21, 1911; c. 5) 1, U. S. Compiled Stat., 1916, annotated, bottom page 553.

The suits at bar are within none of the exceptions.

Idem, bottom pages, 758, 764, 784, 786, 798, 800, 802, 803, 805, 913, 814, 817, 830.

Such amount must be shown, affirmatively.

Johnson v. Wilkins, 116 U. S. 392; 6 Sup. Ct. Rep. 600.

Washington Ry. v. District, 146 U. S. 227; 13 Sup. Ct. 64.

Green v. Fisk, 154 U. S. 668; 14 Sup. Ct. at 1193.

Citizens Bank v. Cannon, 164 U. S. 319; 17 Sup. Ct. at 90.

Though there is an allegation that the drainage project was intended to drain 20,000 acres of agricultural land and though it appears that the board in assessing benefits considered the value of the property in the district belonging to appellees, there is neither plea nor proof as to what either said lands or said properties were worth; and even if there had been such plea and proof it would avail nothing because the values of the said lands and properties are not the amount in controversy.

At the least, proving the values of these was an essential step toward arriving at an amount in controversy.

Washington Ry. v. District, 146 U. S. 227; 13 Sup. Ct. 66.

Johnson v. Wilkins, 116 U. S. 392; 6 Sup. Ct. 600.

These suits were brought at a time when nothing had been done beyond making a tentative assessment of benefits and giving notice of time and place at which this tentative apportionment would be equalized.

It is said in *Green v. Fisk*, 154 U. S. 668; 14 Sup. Ct. 1193:

"There has been no order even for an accounting, and as yet we are not advised there ever will be one; much less that, if it should be made, a balance would be found due from the appellant sufficient to make the value of the matter in dispute, on an appeal by him, such as our jurisdiction requires. As the appellant, to sustain his appeal, must show affirmatively that more in pecuniary value than our jurisdictional requirement has been adjudged against him, he has failed to make a case for us to reconsider."

In *Washington Ry. v. District*, 146 U. S. 227, 13 Sup. Ct. at 66, an appeal was dismissed where the bill alleged that complainant had refused to pay a certain tax and if same were held to be a lawful tax, "the amount which would probably be computed and charged against the complainant by the said municipal authorities would reach nearly if not quite the sum of \$5,200.00 besides interest, fines, and penalties".

It is said in *Milheim v. Moffat*, 262 U. S. 710, 43 Sup. Ct. at 699:

"It is contended that the commission arbitrari-

ly adopted an ad valorem basis of appraisal for the apportionment of benefits to the several parcels of land within the district, without reference to the actual benefits in each. This argument erroneously assumes that the commission had finally adopted such a basis for its appraisal. This is not the case. It had merely adopted a tentative ad valorem basis, subject to modifications and corrections, before final confirmation, after the hearing of objections filed by land owners, of which public notice was given. These land owners did not seek to have the commission modify or correct this tentative basis of apportionment or file any objections to the appraisal of benefits to their properties. Presumably if the tentative appraisal was made on an erroneous basis it would have been modified upon a proper showing. Having failed to object to the tentative ad valorem basis adopted by the commission or to appear before it for the purpose of obtaining modifications or corrections as to their lands before the final adoption of such basis, they have here no sufficient ground of complaint.

"Where a city charter gives property owners an opportunity to be heard before a board respecting the justice and validity of local assessments for proposed public improvements and empowers the board to determine such complaints before the assessments are made, parties who do not avail themselves of such opportunity cannot be heard to complain of such assessment as unconstitutional".

The amount cannot be based upon any contingent loss, including what may result from the probative effect of an adverse judgment, however certain it may be that such loss may occur.

Ross v. Prentiss, 3 How. 771.

New England Co. v. Gay, 145 U. S. 123; 12 Sup. Ct. 816.

As to the prematurity of attack upon proposed tax-

ation it is held in *Western Union v. Howe*, (C C. A.) 180 Fed. at 53, 54, that there may not be relief, "against anticipated injury consequent upon anticipated assessment before the assessment was completed".

The presumption is that the courts of Washington will not deny to any of its citizens or corporations the equal protection of its Constitution. If, however, it should turn out that we are mistaken in this respect, the complainant will have his remedy in an appeal from the highest court of the state to the Supreme Court of the United States.

"The doctrine here is that the aggrieved party must first invoke the aid of the state courts, since it is for the state courts to remedy the acts of state officers done without authority of, or contrary to, state law. In such a case the complaining party must exhaust his remedy in the state courts by prosecuting his case to the state court of last resort for cases of that character; and, until he has done this, it cannot be said that he has been denied due process or deprived of his property by state action. If the decision of the highest state court to which he can resort is adverse to him, he can then take his case on writ of error to the United States Supreme Court upon the ground, not that the proceeding or action complained of was contrary to or unauthorized by state law, but upon the ground that what was complained of as a deprivation of life, liberty, or property without due process of law in violation of the fourteenth amendment has at last received the sanction of the state and, in effect, become the act of the state itself". 5 Ency. U. S. Sup. Ct. Rep. p. 545.

Seattle Electric Co. v. Seattle, R. & S. Ry. Co.,
185 Fed. at 372.

NO SUBSTANTIAL FEDERAL QUESTION WAS PRESENTED.

Each of the appellees other than the City of Sioux Falls has diversity, had there been an affirmative showing of sufficient amount in controversy these five had the right to enter the federal court, even though no substantial federal question was presented. But the City of Sioux Falls needs both the amount in controversy and the substantial federal question.

It is our position that no substantial federal question was presented because at the time these bills were prepared it was as well settled as any law proposition has ever been that in a collateral action such as this the federal courts could grant no relief as to anything complained of in the bills.

Appellees sum up that the due process of law clause requires that "at some stage of the proceedings the tax payer must have an opportunity to appear and be heard both as to the validity of the tax and as to the amount (Omaha brief, in C. C. A. 17); that in a special assessment proceeding the tax payer must have the right at some time or other in some manner or other, to be heard both as to the validity and as to the amount of assessment. — (Idem 20).

Exactly this is held in:

Londoner v. Denver, 210 U. S. 379, 28 Sup. Ct. 714.

Voight v. Detroit, (Mich.) 82 N. W. 253; being 184 U. S. 115 on appeal.

Embree v. K. C. Dist., 240 U. S. 242; 36 Sup. Ct. 320.

McGregor v. Hogan, 263 U. S. 234; 44 Sup. Ct. 51.

Paulson v. Portland, 149 U. S. 30.

Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 926.

The trial court held that the general notice given

as to the hearing on the petition for establishment saved the case from the Fourteenth Amendment. (M. 77).

This notice gave time and place for hearing. (R. 55; O. 55; M. 62; N. 54; S. 53; P. 56); it concluded with a statement "all persons affected by said proposed drainage are hereby summoned to appear at said hearing and show cause if any they have why the said drainage should not be established and constructed" and that "reference is hereby made to the files in said proceedings for further particulars". (M. 71; R. 62; O. 65; P. 65; S. 63; N. 63).

This was sufficient to give the board jurisdiction.

Lamb v. Connolly, (N. Y.) 25 N. E. 1043, 1044.

Hennessey v. Douglas, (Wis.) 74 N. W. 987.

Pittsburg v. Backus, 154 U. S. 421, 14 Sup. Ct. 1116.

There was sufficient notice of time and place at which the tentative apportionment of benefits would be equalized. (S. 17; R. 19; N. 19; O. 19; M. 19; P. 19).

On the equalization hearing review could be had on every matter set forth in the petition asking establishment.

Fallbrook v. District, 164 U. S. 112, 17 Sup. Ct. 62.

People v. Hagar, 52 Calif. at 183.

There could be review on whether the lands would be charged with benefits including all that in the judgment of the board would be benefited. (Opinion of trial Judge, M. 78).

There was the right to make objection to the organization of the district and whether lands were included that should not be and on whether lands included would be benefited.

Embree v. K. C. Dist., 240 U. S. 242, 36 Sup. Ct. 320.

To raise question as to benefits to the owner's lands including all questions of fact which embraces the question of benefit to the lands.

Fallbrook v. District, 164 U. S. 112, 17 Sup. Ct. 62.

On whether the benefits tentatively assessed were out of proportion. (*Idem*). And as to the apportionment among the land owners.

Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 926.

They could there raise all pertinent and available questions and dispute their liability or its amount or extent. (*Idem*). And question the constitutionality and validity of the act; also the amount and mode of the apportionment itself. (*Idem*).

Could present any legal ground of objection including fraudulent discrimination.

Keokuk v. Salm, 258 U. S. 122, 42 Sup. Ct. 208.

Had the right to present whether the project would be a public benefit, as well as whether it would benefit their lands.

Soliah v. Heskin, 222 U. S. 522.

They were bound before attempting to enter any court to exhaust the administrative tribunals which the state had provided for raising all of the above questions.

Fallbrook v. District, 164 U. S. 112 17 Sup. Ct. 62.

And it is only where the matters that may be presented at the hearing are unduly limited that the due process of law clause can be invoked.

Georgia Railway v. Wright, 207 U. S. 127.

If the legislature had itself established this district this would settle the propriety of establishing, or in-

clusion, or what is benefited and even how much. The only difference between legislative establishment and establishment on authority delegated by the legislature is that there must be such notice and opportunity to be heard as is above set forth.

Embree v. K. C. Dist., 240 U. S. 242.

Londoner v. Denver, 210 U. S. 373, and cases cited.

3.

These suits were prematurely brought.

The amount cannot be based upon any contingent loss, including what may result from the probative effect of an adverse judgment, however certain it may be that such loss may occur.

Ross v. Prentiss, 3 How. 771.

New England Co. v. Gay, 145 U. S. 123, 12 Sup. Ct. 816.

As to the prematurity of attack upon proposed taxation it is held in *Western Union v. Howe*, (C. C. A.) 180 Fed. at 53, 54, that there may not be relief, "against anticipated injury consequent upon anticipated assessment before the assessment was completed".

4.

It does not violate the equal rights clause that there was gross overvaluation.

Baker v. Druesedow, 263 U. S. 137, 44 Sup. Ct. 41.

It does not matter how unconstitutional, arbitrary, or discriminatory the method was there may not be this collateral suit where the administrative tribunals provided by the laws of a state have not been exhausted.

Martin v. Dist., 205 U. S. 135, 27 Sup. Ct. 442.

In *Dodge v. Brady*, 240 U. S. 122, being 36 Sup. Ct. 277, it was said, on motion to dismiss complaint for want of jurisdiction because complainant had an adequate remedy at law:

"And this doctrine has been repeatedly applied until it is no longer open to question that a suit may not be brought to enjoin the assessment or collection of a tax because of the alleged unconstitutionality of the statute imposing it." — Citing cases.

Where there is permitted to make payment of tax under protest and then to bring an action at law to contest the validity of the tax, the rule applies that:

"The collection of taxes under state authority will not be enjoined by a court of the United States on the sole ground that the tax is illegal, but it must appear that the party taxed has no adequate remedy by ordinary processes of the law, and that there are special circumstances bringing the case within some recognized head of the equity jurisdiction".

Long v. Norman, (C. C. A.) 289 Fed. 67, with many citations of Supreme Court decisions.

Stonebraker v. Hunter, (C. C. A.) 215 Fed. 67, was an action to enjoin taxes alleged to be illegal:

"It is and must be conceded that independently of statute an action in equity will not lie to enjoin illegal taxes in the absence of some specific grounds for equitable relief. Ordinarily there is a plain, speedy and adequate remedy at law, and, to maintain an action in equity to enjoin such taxes there must be some distinct ground of equitable jurisdiction, such as to avoid a multiplicity of suits or the like."

Citing the *Singer* case, 229 U. S. 481; *Pittsburg Railway v. Board*, 172 U. S. 32; *Shelton v. Platt*, 139 U. S. 591; *Stanley v. Supervisors*, 121 U. S. 535.

The rule that the state may not directly or indirectly keep one having diversity out of the federal courts is in the last analysis a prohibition of discrimination. In other words, a state that permits a suit in its own courts by its own citizens is bound to know of course that a

citizen of another state has an election to enter either the state or the federal court with such suit. All that is prohibited is interference by the state with this additional right of the non-resident. That is to say, as to a suit that both the resident and the non-resident can maintain in state court the state must leave the non-resident free to sue in federal court.

To put it another way — if no one may sue in the court of the state without first exhausting the state administrative tribunals, no one may sue in federal court without exhausting those tribunals.

Nothing less can explain the repeated holding of the federal courts, that exhausting the state administrative machinery is a condition precedent to suing for injunction, at all.

"A suit to enjoin the enforcement of a municipal ordinance on the ground that it will deprive complainant of property without due process of law is not within the jurisdiction of the federal court as involving a constitutional question where the state constitution contains a similar provision and the ordinance, if invalid under one is equally so under the other, the rule being that in such cases the remedy must be first sought in the state courts." — *Seattle Electric Company v. Seattle Railway*, (C. C. A.) 185 Fed. 365.

The assertion that there was disregard of statutory directions is unfounded in fact and the highest Court of the State has ruled as to this very project that there was no irregularity which prevented the acquisition of full jurisdiction by both the assessing Board and the same body as a Board of Equalization. *Gilseth v. Risty*, 46 S. D. 374. (140).

The contention that the statute law was administered in an arbitrary and discriminatory manner and that the assessment of benefits was without a basis in rea-

son, is unfounded in fact. The highest Court in sustaining the project held to the contrary, and no constitutional objection on that ground was ever presented.

Hinds v. Township, (Mich.) 65 N. W. 545. (141).

At any rate, there was conflict on all this and there is no reason why the objection that there was such arbitrary action should not have been submitted to the Board of Equalization, assuming for the sake of the argument that appellees were not bound so to submit even if there had been no such conflict. (144 to 147).

It is difficult to see how there may be claim of arbitrary or discriminatory assessment where there is no showing what the properties of the respective parties were worth, and where as yet it cannot be known, because no equalization has been had, what the assessment will finally be.

5.

No substantial Federal question was presented. (92, 93, 94).

In *Dodge v. Brady*, 240 U. S. 122, being 36 Sup. Ct. 277, it was said, on motion to dismiss complaint for want of jurisdiction because complainant had an adequate remedy at law:

"And this doctrine has been repeatedly applied until it is no longer open to question that a suit may not be brought to enjoin the assessment or collection of a tax because of the alleged unconstitutionality of the statute imposing it." — Citing Cases.

Where there is permitted to make payment of tax under protest and then to bring an action at law to contest the validity of the tax, the rule applies that:

"The collection of taxes under state authority will not be enjoined by a court of the United States on the sole ground that the tax is illegal, but it

must appear that the party taxed has no adequate remedy by ordinary processes of the law, and that there are special circumstances bringing the case within some recognized head of the equity jurisdiction".

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To put it another way — if no one may sue in the court of the state without first exhausting the state administrative tribunals, no one may sue in federal court without exhausting those tribunals.

Nothing less can explain the repeated holding of

the federal courts, that exhausting the state administrative machinery is a condition precedent to suing for injunction, at all.

The administrative state tribunals must be exhausted first because it is not to be assumed that these tribunals will not modify and correct as justice demands.

Milheim v. Moffat, 262 U. S. 710; 43 Sup. Ct. 699.

To like effect is *Scattle v. Scattle Railway*, (C. C. A.) 185 Fed. at 372.

Oklahoma permits injunction to restrain the illegal levy of any tax.

"If this section would authorize a suit in the state court then the plaintiff being a citizen of Missouri could maintain the action in the United States court."—Citing *Cummings v. Merchant Bank*, 101 U. S. 153.

The question, therefore, is whether this action could be maintained in any of the courts of Oklahoma.

"We find that the Supreme Court of Oklahoma has uniformly held, where the question was considered by it, that such suit would not lie, and there being no allegation in the bill of any distinct grounds of equitable jurisdiction" — dismissal of the bill is affirmed.

Stonebraker v. Hunter, (C. C. A.) 215 Fed. 69, 70.

Each of the lower courts laid much stress on the fact that the board had not observed relevant statutes. But all relevant statutes were observed and thus was obviated all the objections under the Fourteenth Amendment. (M. 84, 85).

The statute gave ample opportunity to be heard both by the administrative tribunals and afterwards on appeal from the final decision to the regularly constituted courts of the state. (M. 90). — Wherefore, no objections

on the score of unconstitutionality lies in collateral suits such as the one at bar.

Soliah v. Heskin, 222 U. S. 522.

Whatever discrimination there may be is not available where the parties fail to avail themselves of what the Board of Equalization might do.

First National Bank v. Board, 264 U. S. 450;
44 Sup. Ct. at 386.

Plaintiffs have failed, likewise, in showing systematic refusal on the part of the state board to allow a proper reduction in the valuation of any railroad.

Southern Railway Co., 260 U. S. 519; 43 Sup. Ct. 195.

Union Pacific v. Commissioners, (C. C. A.) 217 Fed. 541, is a suit by the railroad against the commissioners and its tax collecting officers to restrain the collection of certain taxes levied for the year 1912, and the complaint charges that the property of the company was assessed at one-third of its actual value while all other property was assessed at not to exceed one-fifth of its value. It is further charged that some classes of property which should properly have been assessed for the purpose of taxation were wholly omitted by the assessors. These discriminations are alleged to have been systematic and deliberate. Temporary injunction was denied.

The question whether an assessment is excessive is not for the courts to try and the board of review is the only tribunal to try and determine that question.

The board of review is a tribunal provided by law in which the taxpayer may appear to contest an unequal or excessive assessment. Failing to appear there, he is estopped to assail the assessment afterwards. Citing cases.

Township v. Rose, (Mich.) 53 N. W. at 928.

Even if a substantial Federal question were presented, appellees had no right to enter the District Court because the amount in controversy was insufficient. (83, 84).

6.

While the appellees did not have a sufficient amount in controversy, appellants do have a sufficient amount to maintain appeal from the Circuit Court of Appeals to this Court.

The entry into the Federal Court is governed by one statute, the entry into the Supreme Court on appeal by an independent one.

On the right to appeal, the test is how much has been adjudged to the appellees. — *Green v. Fish*, 154 U. S. 668, 14 Sup. Ct. 1193.

Appellees will, if there be an affirmance, be denied the right to raise a \$250,000.00 assessment and therewith to pay the drainage warrants outstanding. (80).

The appellees having entered the Federal Court on the plea that more than \$3,000.00 was in controversy, will not now be heard to say that their opponents' may not maintain appeal because there is less than \$1,000.00 involved.

Butte v. Clark, 249 U. S. 12; 39 Sup. Ct. 233. (81).

7.

There was no denial of the equal protection of the laws in violation of the Constitution of the United States. (86, 87).

There was no plea asserting such violations. (P. 87, 89).

There was nothing in the administration of the statutes that violated the Federal Constitution. (M. 88). It is doubtful to say the least whether the decision of either of the lower Courts is addressed to any viola-

tion of the Constitution of the United States; and the trial Court expressly ruled that the due process clause had not been violated. While it is true it discusses denial of the equal protection of the laws, we submit it did not place the decision in whole or in part on that violation — and the Circuit Court of Appeals declined to determine any constitutional question; so that at no time was it the fact or was it held that the charge of unconstitutionality had been sustained.

8.

No fraud was charged, but each of the lower Courts largely based decision on the existence of a fraud said to consist of the pretense that an independent drainage project had been established, when in truth this was a scheme to raise the larger amount that could be raised for the new project in order to repair old ditches which the appellant Board had inefficiently constructed. (95, 96).

No such subterfuge was established by the evidence, and the highest court passing upon this very project, held there was no fraud of any kind, and that the project was in truth a new and independent drainage system.

At all events, opportunity was given to present objection on the ground that there was such subterfuge, to the Board of Equalization. (96, 97, 98, 99).

There was at any rate no fraud that will avail because nothing was done to prevent full presentation of all objections to the administrative tribunals. (101).

Where the administrative tribunals and the appeal provided by state laws are not exhausted, chancery has no jurisdiction where nothing is involved but the unconstitutionality of the tax. — *Shelton v. Platt*, 139 U. S. 591, 11 Sup. Ct. 648, 649. — *Boise v. Boise*, 213 U. S. 276, 29 Sup. Ct. 428.

A non-constitutional tax or one tainted with fraud

still presents nothing but the case of an invalid tax and where the administrative relief is not exhausted, invalidity of a tax may not be urged. — *Union Pacific v. Commissioners*, (C. C. A.) 217 Fed. 544; *Shelton v. Platt*, 139 U. S. 591, 11 Sup. Ct. 647, 648.

9.

Section 267, Judicial Code, reads as follows:

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain adequate and complete remedy may be had at law."

And it was said in *New York Guaranty Company v. Memphis*, 107 U. S. 205:

"This enactment certainly means something".

Smith v. Douglas County, (C. C. A.) 242 Fed. 856.

There was no right to entertain these suits in chancery because nothing was involved but the claim that a tax was invalid, and there was no recognized ingredient of the chancery jurisdiction in the case; and with the exception of the appellee, Power Company, the real property of appellees could not be affected by either a cloud or a lien. — *Wallace v. Hines*, 253 U. S. 66, 40 Sup. Ct. 436; *Union Pacific v. Board*, 247 U. S. 282, 38 Sup. Ct. 510.

Assuming with each of the lower courts that the board acted wholly without jurisdiction and was, therefore, committing a naked trespass, there was adequate remedy on the law side of either the state or federal courts by a suit for damages. Wherefore there was no chancery jurisdiction. — *Shelton v. Platt*, 139 U. S. 591, 11 Sup. Ct. 648.

10.

It was error to overrule the defendant's plea of estoppel.

The acts upon which the plea is founded are not in dispute. The Circuit Court of Appeals recognizes their existence, but denied the plea on the unfounded ground, among others, that at the time when these acts were done, those who did them had not yet been notified that their property would be affected. (148 to 152).

11.

It would be mere pedantry to cite cases for the proposition that this court is bound by the construction of state laws and state constitution on part of the highest court of the state.

12.

Where the legislature establishes, it settles against all court review, proper inclusion, and that property included will be especially benefited. — *Milheim v. Moffat*, 262 U. S. 710, 43 Sup. Ct. 698.

Whether the estimate of the value of land for the purposes of taxation as fixed by the legislature exceeds its true value, the Supreme Court cannot consider upon writ of error to a state court. — *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 926.

As said elsewhere, when the legislative function is delegated the action of the one to whom the power is delegated is conclusive. The only difference is that the board acting under delegation must give notice and opportunity to be heard.

13.

It does not work an inequality which is protected by the constitution of the United States that the administrative boards have not arrived at an assessment of benefits which is exactly equal to the benefit received. — *Southern Railway v. Watts*, 260, U. S. 519, 43 Sup. Ct. 195, 197; *Stanley v. County*, 121 U. S. 535, 7 Sup. Ct. 1238, 1239.

There should not be extracted from the very general language of the Fourteenth Amendment a system of delusive exactness. — *Martin v. Dist.*, 205 U. S. 135, 27 Sup. Ct. 441.

The Fourteenth Amendment "was not intended to compel the states to adopt an iron rule of equal taxation". — *Branson v. Bush*, 251 U. S. 182, 40 Sup. Ct. 115.

Railroads differ in so many respects from other properties that they as a class must be taxed differently or additionally so long as that is not inconsistent with the constitution of the state. — *Southern Railway v. Watts*, 260 U. S. 519, 43 Sup. Ct. 197.

"The equal protection clause is not violated by prescribing different rules of taxation for railroad companies than for concerns engaged in other lines of business". — *Baker v. Druesdow*, 263 U. S. 137, 44 Sup. Ct. at 41.

There must be added the obvious fact that anything that develops the territory which a railroad serves must necessarily be a benefit to it, and that no agency for such development equals that of good roads — and the holding of the Circuit Court of Appeals that the railroad would not be benefited by the improvement cannot be sustained.

Branson v. Bush, 251 U. S. 182, 40 Sup. Ct. 116.

Traffic benefits resulting from the haul of increased croppage on lands within a drainage district, because of overflow protection, are sufficient to authorize assessment of railroad property for improvements within such district, though there were no direct benefits, by way of protecting the company's right-of-way from overflow.

Thomas v. Kansas City Southern Ry. Co., 277 Fed. 708.

Wherever there have been holdings such as in *Kansas City Railway v. Road Improvement District*, 256

U. S. 658, 41 Sup. Ct. 604, or *Gast v. Schnider*, 240 U. S. 155, 36 Sup. Ct. 255, there was direct attack upon the assessment. In other words, the administrative tribunal had been exhausted before the federal court was entered.

14.

BENEFITS.

Section 6 of Article 21 of the constitution of South Dakota, makes the drainage of agricultural lands a "public purpose" and gave to the legislature the authority to provide therefor and that the same should be paid for "by special assessments upon the property benefited according to benefits received." Here is no constitutional limitation upon "property benefited". Whatever that "property" might be, it may constitutionally be assessed if benefited. Section 8463, Code 1919, provides, "The proportion of benefits which any county, city * * * may obtain by the construction of such drainage to *highways or otherwise* and the benefits which any railroad company may obtain for its *property* * * * shall be fixed and equalized together with a proportion of benefits to *tracts of land*." It will be seen, that the drainage may be constructed for a "public purpose" included in which is the drainage of farm lands, but that under both the constitution and law the only limit in respect to benefits is that the drainage shall be constructed and paid for by special assessments upon "property benefited" without regard to the nature or kind of *property*, the only requirement being that it be *benefited*.

Com'rs of Highways v. Com'rs of Drainage, (Ill.)
21 N. E. 207.

The power to treat a drainage improvement as giving relief to agricultural lands is not limited to lands that are absolutely worthless and incapable of growing anything valuable without irrigation. — *Fallbrook v. District*, 164 U. S. 112, 17 Sup. Ct. 66.

Though the land sought to be assessed for benefits in the construction of a drainage ditch were covered by

native timber and underbrush, grass and weeds, though they were never used for for agricultural purposes and were of little or no value, they were nevertheless subject to assessment as agricultural lands.

"Certainly a tract of land need not be in use and cultivated for agricultural purposes in order for it to be agricultural land * * * * (unimproved lands) are agricultural lands before they are prepared as well as afterwards." — *Milne v. McKinnon*, 32 S. D. 627.

15.

To avail of a fraud in any event, even if resort had first been had to the administrative tribunals provided, it must appear there was an undervaluation which was intentional and systematic, and unless that is shown an equal assessment will not be held to violate the equality clause.

Southern Railway Co. v. Watts, 260 U. S. 519, 43 Sup. Ct. 195.

16.

The Courts cannot relieve against honest mistakes of judgment in the administrative Boards.

Maish v. Territory, 164 U. S. 599, 17 Sup. Ct. 198.

Baker v. Druesedow, 263 U. S. 137, 44 Sup. Ct. 41.

Pittsburg Railroad v. Backus, 154 U. S. 421, 14 Sup. Ct. 1120.

And in the Pittsburg case it was stressed there was no evidence the Board had before it or considered any matter in reaching its determination which it was not proper to receive and consider.

At the most there have been errors of judgment;

and mere errors of judgment are not subject to review in these proceedings.

Southern Railway Co., 260 U. S. 519; 13 Sup. Ct. 195, 196.

All of which is respectfully submitted,

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(i)

Appendix A

PROVISIONS OF SOUTH DAKOTA CONSTITUTION

SECTION 2 OF ARTICLE VI.

§ 2. No person shall be deprived of life, liberty or property without due process of law.

SECTION 6 OF ARTICLE XXI.

§ 6. The drainage of agricultural lands is hereby declared to be a public purpose and the legislature may provide therefor, and may provide for the organization of drainage districts for the drainage of lands for any public use, and may vest the corporate authorities thereof, and the corporate authorities of counties, townships and municipalities, with power to construct levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state, by special assessments upon the property benefited thereby, according to benefits received.

Appendix B

SOUTH DAKOTA DRAINAGE STATUTES

(Note: The section numbers at the beginning of each paragraph are those of the South Dakota Revised Code of 1919. The references at the end of each paragraph are to the Session Laws of the various years. The paragraphs as printed constitute the law as it stood at the time of the transactions involved in this suit.)

§ 8458. **POWER OF COUNTY COMMISSIONERS.** The Board of County Commissioners, at any regular or special session, may establish and cause to be constructed any ditch or drain; may provide for the straightening or enlargement of any watercourse or drain previously constructed, and may provide for the maintenance of such ditch, drain or watercourse whenever such ditch, drain or watercourse shall be conducive to the public health, convenience or welfare, or whenever the same shall be for the purpose of draining agricultural land. (§ 1, ch. 98, 1905; § 1, ch. 134, 1907.)

§ 8459. **PETITION.** Such board shall act only upon a written petition signed by one or more owners of land likely to be affected by the proposed drainage. Such petition shall set forth the necessity for the drainage, a description of the proposed route by its initial and terminal points and its general course, or by its exact course in whole or in part, and a general statement of the territory likely to be affected thereby. The petition shall be accompanied by a bond with sufficient sureties to be approved by the county auditor, conditioned to pay all expenses incurred in case the board does not grant the petition or the same is denied on appeal. Such petition may be presented at any regular or special meeting of the board and, if sufficient in form, shall be ordered filed with

(iii)

the county auditor. (§ 2, ch. 98, 1905; § 2, ch. 134, 1907.)

§ 8460. INSPECTION OF PROPOSED ROUTE. It shall be the duty of such board to act promptly upon all drainage petitions. Upon filing such petition the county auditor shall transmit a copy thereof to the state engineer, who, together with the board of county commissioners shall as soon as practicable, inspect the proposed route and, if in the opinion of such board and the state engineer it is necessary, the board shall cause a survey of the proposed drainage to be made by such competent surveyor as such board may select, but such survey shall be under the general supervision of the state engineer. Such survey shall primarily be for the purpose of aiding the board in determining the necessity of the proposed drainage, but may be a complete survey such as will be required for the construction of the proposed drainage and assessment of its cost, or as much less as the board may require. Such survey may extend to other lands than those affected by the proposed drainage for the purpose of determining the best practical method of draining the entire section of country of which the lands proposed to be drained, or a portion of them, are a part. For the purpose of inspection, the county commissioners, surveyors or their employees may enter upon any lands traversed by the proposed drainage or in their judgment likely to be affected thereby. The county auditor shall promptly furnish the state engineer with a copy of the surveyor's report mentioned in the succeeding section and of all maps and plans filed by such surveyor and also with a copy of such further files as the state engineer may ask for. In case the drainage is established the preparation of plans and specifications upon which the contract of construction is to be awarded and also the work of construction, shall be under the supervision of the state engineer. It shall be the duty of the state engineer to render such assistance and advice to the board of county commissioners in regard to such drainage as the duties of his office will permit and he shall be reimbursed by such board for his expenses incident thereto;

(iv)

provided that in case of minor ditches the state engineer shall not be required to attend with the board of county commissioners at the first inspection, nor to perform subsequent services if in his judgment it shall not be necessary for him to do so. (§ 3, ch. 98, 1905; § 3, ch. 134, 1907; § 1, ch. 102, 1909.)

§ 8461. **SURVEYOR'S REPORT—NOTICE OF HEARING.** The surveyor shall report in writing to the board of county commissioners and his report shall be filed with the petition. After personal inspection or after the receipt of the surveyor's report the board shall determine the exact line and width of the ditch, if the same shall not be fixed in the petition, and shall file its determination with the petition. The board shall then fix a time and place for the hearing of the petition and shall give notice thereof by publication at least once each week for two consecutive weeks in a newspaper of the county, to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall describe the route of the proposed drainage and the tract of country likely to be affected thereby in general terms, the separate tracts of land through which the proposed drainage will pass and give the names of the owners thereof as appears from the records of the office of the register of deeds on the date of the filing of the petition, and shall refer to the files in the proceedings for further particulars. Such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed, and shall summon all persons deeming themselves damaged by the proposed drainage or claiming compensation for the lands proposed to be taken for the drainage to present their claims therefor at such hearing. (§ 4, ch. 98, 1905; § 4, ch. 134, 1907; § 2, ch. 102, 1909.)

§ 8462. **HEARING ON PETITION.** At such hearing any person interested may appear and contest the statements of the petition and matters set forth in the

surveyor's report and the finding of the board as to width and route. The petitioners in like manner may be heard in support of the petition. After full hearing the drainage may be established along the line set forth in the petition or in the finding of the board prior to the hearing, or the board may vary the route thereof, or its width, as deemed practicable or necessary. If the board deems it best to vary the route, or to materially change the initial or terminal points of such proposed drainage so that it will pass through other lands than those described in the notice of hearing, or to increase the width of lands to be taken for the proposed drainage, the board shall adjourn the hearing and give the owners of such lands notice as in case of the original hearing. No open ditch shall be constructed within the limits of any public highway except where the topography of the country makes such construction advisable and in such case the ditch shall be located at a sufficient distance from the center of such highway to permit a roadway of standard width being constructed. If the proposed drainage does not give sufficient fall to drain the lands sought to be drained or will not properly take care of the waters collected by such drainage, the same shall be extended so as to secure the drainage or properly dispose of the water. The hearing in any such case shall be adjourned and notice given to all parties newly affected as in case of the original hearing. When the board of county commissioners shall have fully heard and considered such petition, and all matters in opposition to or in support of the same, it shall, if it finds the proposed drainage not conducive to the public health, convenience or welfare, or not needed or practicable for the purpose of draining agricultural lands, deny such petition, the petitioners to be jointly and severally liable for the costs of the proceeding, the same to be recovered in a civil action. If it finds the drainage proposed or any variation thereof conducive to the public health, convenience or welfare, or necessary or practicable for draining agricultural lands, it shall establish the drainage and shall assess the damages sustained by each tract of land or other property

through which the same shall pass and the damages as compensation for the land taken for the route of such drainage. Any person interested may be heard in the matter of damages or compensation for land and the determination of the board of county commissioners shall be final unless an appeal therefrom, as provided in this article, shall be taken, failure to prosecute such appeal or to appear and contest an award of damages by the board to be deemed conclusively a waiver of any such damages or compensation for land taken or of any claimants right to have the same assessed by the jury. Such drain shall be given a name and the proceeding thereafter taken shall be recorded and indexed in a book kept for that purpose in the auditor's office. (§ 5, ch. 98, 1905; § 5, ch. 134, 1907; § 3, ch. 102, 1908; § 1, ch. 205, 1917.)

§ 8463. **EQUALIZATION OF BENEFITS.** After the establishment of the drainage and the fixing of the damages, if any, the board of county commissioners shall fix the proportion of benefits of the proposed drainage among the lands affected, and shall appoint a time and place for equalizing the same. Notice of such equalization of proportion of benefits shall be given by publication at least once each week for two consecutive weeks in a newspaper of the county to be designated by the board, and by posting copies of such notice in at least three public places near the route of the proposed drainage. Such notice shall state the route and width of the drainage established, a description of each tract of land affected by the proposed drainage and the names of the owners of the several tracts of land as appears from the records of the office of the register of deeds at the date of the filing of the petition and the proportion of benefits fixed for each tract of property, taking any particular tract as a unit, and shall notify all such owners to show cause why the proportion of benefits shall not be fixed as stated. Upon the hearing of the equalization of the proportion of benefits, the board of county commissioners shall finally equalize and fix the same according to benefits received. The proportion of benefits which any county, city, town or township may obtain by the construction of

such drainage to highways or otherwise, and the benefits which any railroad company may obtain for its property by such construction, shall be fixed and equalized together with the proportion of benefits to tracts of land. Benefits to be considered in any case shall be such as accrue directly by the construction of such drainage or indirectly by virtue of such drainage being an outlet for connection drains that may be subsequently constructed. (§ 6, ch. 98, 1905; § 6, ch. 134, 1907; § 4, ch. 102, 1909.)

§ 8464. **ASSESSMENTS.** After the equalization of the proportion of benefits the board may make an assessment against each tract and property affected, in proportion to the benefits as equalized, for the purpose of paying the damages and the cost of establishment thus far incurred or to be incurred. The cost of establishment shall include the costs of the service of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all other expenses incurred or to be incurred that in any way contributed or will contribute to the establishment or construction of the drainage. At the expiration of thirty days after the making of such assessment, a copy thereof certified by the county auditor shall be filed by him with the county treasurer, but before the same is filed a notice shall be given by the board of the time when the same will be so filed, by publication at least once each week for two consecutive weeks in a newspaper in the county to be designated by the board and by posting copies of such notice in at least three public places near the route of such drainage. Such notice shall also contain a description of the property assessed, the name of the owner as it appears in such assessment and the amount of each assessment, together with the amount assessed against the county or any city, town, township or railroad company, and shall also give the date when the assessment will become delinquent, together with the amount of penalty which will then accrue and the date from which interest will begin to run.

From the time of filing such certified copy of assess-

ment in the treasurer's office, the same shall be due and payable and shall be valid and perpetual liens upon the respective tracts so assessed against all persons or governments except the State and the United States and, if not paid within ten days, a penalty of five per cent shall attach thereto and such assessment shall bear interest from the date of the order of the assessment at a rate not to exceed eight per cent per annum payable annually. Such assessment shall be paid to and received by the county treasurer and paid over to the holders of the assessment certificates or upon the order of the board of county commissioners. The board of county commissioners may issue separate assessment certificates against each tract assessed for the amount of the assessment thereon, and may sell the same at not less than par value with all accrued interest, or may contract to pay for the construction of such drainage with such assessment certificates or with warrants. Such assessment certificates shall refer to the record in the office of the county auditor of the order of assessment and of the filing of a copy thereof in the county treasurer's office, shall transfer to the holder all interest, claim, or right in or to such assessment, bear the same rate of interest, carry the lien of such assessment and be enforceable as provided by law. Assessments for drainage or installments thereof shall be enforced by the county treasurer by sale of the property at the annual tax sale, provided that no such assessment or installment thereof shall be included in the sale of any given year unless the same shall have been delinquent on or before August first of each year. The provisions of Chapters 7, 8, 9, Part 9 of this title shall apply to the enforcement of the lien or drainage assessments so far as such provisions are applicable, except that a treasurer's deed issued upon a delinquent drainage assessment shall recite the fact that the title conveyed is subject to all the claims which the state or any political subdivision thereof may have thereon for annual taxes.

Whenever an assessment for drainage or an installment thereof has been made against any county, city, town or township, as provided in this chapter, the officers

of such county, city, town or township, whose duty it is under the law to make the levy of taxes, shall at the time of the next annual tax levy after the making of such assessment make a levy for drainage purposes of such an amount as shall be necessary to pay such assessment, and return the same to the proper officers as provided by for the other taxes, and such levy and tax shall be enforced and collected in all respects as provided by law for other taxes; provided, that any surplus remaining in any fund at the close of any year may be used by any township to pay and apply on any drainage assessment, as provided herein; provided, further, that in unorganized townships the county commissioners shall be authorized to pay for drainage as provided herein out of any money belonging to such unorganized township, and each succeeding year a like levy shall be made by such authorities until the whole of such assessment for drainage is paid. Instead of making an annual assessment for the purpose of paying the damages allowed in any drainage proceeding and the costs of establishment and construction, the board of county commissioners may issue warrants payable only out of the assessments to be subsequently made, the same to bear interest at a rate not to exceed eight per cent per annum payable annually, and may sell such warrants at not less than the face value thereof and shall with such money so raised pay any damages allowed and cost of establishment and construction. In making assessment for such drainage such warrants and the cost of issuing the same shall be included in the costs of the drainage. (§ 7, ch. 98, 1905; § 7, ch. 134, 1907; § 5, ch. 102, 1909; ch. 130, 1911, and as amended by § 1, ch. 46, Laws of Second Special Session of the Sixteenth Session of the Legislature of South Dakota 1920.)

§ 8465. BIDS—SPECIFICATIONS—CONTRACTS.

Whenever sufficient money shall have been collected the damages occasioned by the construction of such drainage and fixed as herein provided shall be paid and thereupon the board of county commissioners shall proceed to construct such drainage and shall let contracts for the construction of the same. Such contracts may require the

contractors to take their pay in assessment certificates or in warrants to be thereafter issued. The contract may be for the construction of the entire drainage or for any portion thereof, and shall be let upon competitive bids, the board reserving the right to reject any and all bids. The lowest responsible and capable bidder shall be accepted but if any landowner affected be an equally low, capable and responsible bidder with a non-owner of the lands affected the former shall be preferred. When any contract shall be let the contractor shall give a bond in such sum as shall be approved by the board of county commissioners, conditioned for the faithful performance of his work and full completion of his contract to the satisfaction of such board. For the information of the contractors in bidding upon the proposed drainage, full plans and specifications shall be filed in the office of the county auditor. If in the judgment of the board of county commissioners the entire drainage or any part thereof can be constructed for less money than the amount of any bid submitted therefor, the board may cause such drainage to be constructed, hire the necessary labor and purchase all necessary material for such construction, without letting contracts therefor. Contracts for building bridges or culverts rendered necessary by the construction of such drainage may be let separately and after the drainage is completed. The cost of constructing such bridges or culverts shall be charged in the first instance as part of the cost of drainage and thereafter such bridges and culverts shall be maintained as part of the highway; provided, that the cost of removing, repairing, enlarging or replacing bridges and culverts already existing across the line of a proposed drainage ditch shall not be charged as a part of the drainage. (§ 8, ch. 98, 1905; § 8, ch. 134, 1907; § 6, ch. 102, 1909; ch. 206, 1917.)

§ 8467. ASSESSMENTS FOR FURTHER COSTS.

At any time after the damages arising from the establishment and construction of such drainage are paid and the lands for such drainage are taken, assessments may be made for further costs and expenses of construction. If

the contractors are required and agree to take assessment certificates or warrants for their services, assessments need not be made until the completion of the work when an assessment shall be made for the entire balance of cost of construction, including the services of the board of county commissioners, surveyors and assistants, plans and profiles, publication and filing, and other fees, interest on bonds issued or to be issued and all expenses of every kind and nature that contribute to the establishment and construction of the drain and notice of such assessment shall be given by the board of county commissioners in all respects as provided for the first assessment. And such assessment and the certificates issued thereon shall be in like manner perpetual liens upon the tracts assessed, interest-bearing and enforceable as such first assessments and certificates. The board of county commissioners may sell such assessment certificates at not less than par and thereby raise funds to defray the cost of establishment and construction. If there be no damages to be paid before taking the lands for such drainage, or if the damages have been paid by the proceeds of the sale of warrants only one assessment need be made. In any case, in the discretion of the board, several assessments may be made as the work progresses. Assessments shall be paid to the county treasurer and the money therefrom shall be paid by him to the holders of assessment certificates, or upon the order of the board of county commissioners for the purpose of the particular drainage. (§ 10, ch. 98, 1905; § 10, ch. 134, 1907; § 7, ch. 102, 1909.)

§ 8469. APPEALS. An appeal shall lie for any final order or determination of the board of county commissioners establishing or denying any proposed drainage; fixing damages occasioned by the taking of lands for drainage or caused by such drainage; fixing the proportion of assessments of benefits; or accepting any drainage to the circuit court of the county in which such drainage is located by any one deeming himself aggrieved by any such order or determination. Written notice of such appeal shall be served upon the board of county

commissioners and a bond conditioned to pay all the costs of such appeal, in case the contention of appellant be not sustained in some respect, shall be filed in the office of the clerk of courts, to be approved by him in such amount and with such sureties as he deems necessary. Upon the service of such notice and the filing of such bond, the county auditor shall transmit to the clerk of courts the petition and all other papers and records in the matter or certified copies thereof, when the convenience of the auditor's office would be seriously impaired by the transmission of the original records, and such matter shall be heard as an original action in the circuit court. No appeal shall operate as a stay of proceedings by the board of county commissioners, but the court may upon the taking of an appeal, for good cause shown issue an order staying the further proceedings by the board of county commissioners until the hearing and determination of such appeal. Before granting such stay, the court shall require an undertaking in sufficient amount and with sufficient surety to the effect that if the order appealed from be sustained the person upon whose motion the stay is granted shall pay all damages caused by the issuance of such order of stay. Any number of persons interested may join in the same appeal. Appeals shall be in all cases taken within thirty days from the making of the order or determination appealed from. If, on the trial of such action, it be determined that the drainage as petitioned for and established by order of the board is not conducive to the public health, convenience or welfare or is not necessary or practicable for the purpose of draining agricultural lands, the petitioners shall be jointly and severally liable for all the costs thus far incurred. If the contention of the appellant as to the amount of damages or proportion of benefits, the acceptance of the drainage, of the practicability of the drainage when the route thereof is varied by the county commissioners over the protest and objection of the petitioners, be sustained in whole or in part, the costs of such trial shall be part of the cost of the drainage. Upon an appeal from an assessment of benefits, the court

or jury shall consider not only the relative benefits, to the tract in regard to which the appeal is taken, with reference to the tract taken as a unit, but shall also consider the question as to whether the tract taken as a unit is benefited or not; if benefited, to what extent. (§ 12, ch. 98, 1905; § 12, ch. 134, 1907; § 9, ch. 102, 1909.)

§ 8474. FURTHER POWERS OF BOARD. Where proceedings have been had for the establishment of a ditch, drain, levee, or straightening or enlarging of a natural watercourse under the law as heretofore existing, and the improvement has been established and constructed and assessments made upon the land benefited thereby, or upon any portion thereof, for the cost of such improvement, and where the assessment so made cannot for any reason be enforced, the board shall proceed as in all lands benefited by such improvement in the same manner as if the appraisement and apportionment of benefits had never been made, and it shall proceed in the manner provided in this article, using as a basis the entire cost of such improvement, and in the assessment of such benefits account shall be taken of the amount of assessments, if any, that have been paid by those benefited and credit therefor shall be given accordingly. (§ 17, ch. 98, 1905; § 17, ch. 134, 1907.)

§ 8476. POWERS DEFINED. The powers conferred by this article for establishing and constructing drains shall also extend to and include the deepening and widening of any drains which have heretofore been or may hereafter be constructed, also to straightening, cleaning out and deepening the channels of creeks and streams and constructing, maintaining, remodeling and repairing levees, dykes and barriers for the purpose of drainage; and the board of county commissioners may relocate or extend the line of any drain if the same is necessary to provide a suitable outlet, and shall cause a survey thereof to be made, but no proceedings affecting the rights of persons or property shall be had under this section except upon notice and the other procedure pre-

scribed herein for the construction of drains. (§ 19, ch. 98, 1905; § 19, ch. 134, 1907.)

§ 8482. DRAINS FOR TOWNS AND CITIES. The board of county commissioners shall have authority to establish drainage for or including the whole or any part of any city or incorporated town, including cities acting under special charter, as provided in this article, and it shall have the same authority with respect to the assessment of damages and benefits within such city or town or in other cases provided for in this article, and like notices to such city or town with respect to the establishment of such drainage and the apportionment and assessment of damages and benefits shall be given as is required by this article to be given to the owner of property damaged or benefited by the establishment or construction of such improvement. (§ 24, ch. 98, 1905; § 24, ch. 134, 1907.)

§ 8486. NOTICES, HOW SERVED. Notice by personal service, as of a summons in a civil action, may be given instead of by publication and posting in all cases where notice is provided for in this article. In any case where notice is required under the provisions of this article and any person affected by the drainage has not been notified, either by publication or personally, and a hearing has been had or determination made, such person may be notified personally or by publication and posting, to show cause at a time and place to be fixed by the board of county commissioners, and to make return or claim damages as in case of the original hearing. Any such omitted person may be brought in on such due notice at any stage of the proceeding, or after it has been otherwise concluded. The enforcement of any assessment shall not be enjoined for want of the notice provided for in this article, except pending an application to the board of county commissioners for the determination of such matters as to which any person deems himself not bound because of want of notice. (§ 28, ch. 134, 1907.)

§ 8488. DEFECTS IN PROCEEDINGS DISREGARDED. Any defect or irregularity not affecting the substantial rights of parties interested, occurring in any drainage proceeding, shall be disregarded in any action seeking to avoid an assessment or cancel, annul or declare void any such proceeding. And in case the defect is substantial the court shall of its own motion determine the rights of the parties, validate the proceedings and assess the costs as justice may require, if the court shall find cause for such valuation or such action should have been taken in the first instance and all parties interested are before the court. (§ 29, ch. 98, 1905; § 30, ch. 134, 1907.)

§ 8489. INVALID OR ABANDONED PROCEEDINGS. If any proceeding for the location, establishment or construction of any drain under the provisions of a previous law has been heretofore enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned, or if any such proceeding or like proceeding under this article be hereafter enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned in consequence of any error, defect, irregularity or want of jurisdiction affecting the validity of such proceeding or for any cause, the board of county commissioners may nevertheless proceed to locate a drain or drains under the same or different names and in the same or different locations from those described in the invalid or abandoned proceedings under the provisions of this article. In case any new proceeding be had resulting in the location of a drain in the same or substantially the same location as that described in the invalid or abandoned or dismissed proceeding, and the extent to which the same will contribute to the location, establishment or completion of such new drain. Such value shall be determined at a hearing upon the same notice as the equalization of benefits or assessments, and may at the same time or at any other time, and the notice of such hearing may be a part of the notice of the hearing upon the equalization of benefits or assessments or separate therefrom, but the board shall in any case notify all persons interested to show cause why

the determination of the board thereupon shall not be final. When finally fixed such value shall become a part of the cost of the new drainage. No use shall be made by the board of county commissioners in the laying out or completion of any drain or ditch under this article of any map, chart, survey, or other work done under any former law or under this article without having paid therefor; and all sums allowed for any work or material or money expended under the provisions of any previous law or under this article shall be paid to the persons who have paid therefor in proportion to the amounts severally paid by such persons. (§ 33, ch. 134, 1907.)

§ 8491. REFUNDING SURPLUS ASSESSMENTS.

The board of county commissioners shall have authority and it shall be its duty to refund, upon request, any excess assessment or funds not necessarily used in the construction of any drainage, made or levied against any person, private corporation, city, town or township within any drainage district, in proportion to the amount paid by him or it. (Ch. 219, 1913.)

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EXHIBIT "C".

GENERAL AND LOCAL ASSESSMENT AGAINST
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§ 6606. COLLECTION, HOW MADE AND ENFORCED. All laws relating to the enforcement of the payment of delinquent taxes shall be applicable to all taxes levied under the provisions of this article, and whenever any taxes levied under the provisions of this article shall become delinquent, the county treasurer having control of such delinquent taxes may proceed to collect the same in the same manner and with the same right and power as a sheriff under execution, except that no process shall be necessary to authorize him to sell engines, cars or any rolling stock for collection of such taxes. (§ 11, ch. 100, 1915.)

IN THE
Supreme Court of the United States

OCTOBER TERM, 1925

No. 95

**A. G. RISTY, et al, as County Com-
missioners, etc., et al,**

Appellants,

vs.

**CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY,**

Appellee,

**And the Five Other Cases set forth on the cover
page hereof numbered 95 to 100 inclusive.**

REPLY BRIEF AND ARGUMENT FOR APPELLANTS.

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IN THE
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OCTOBER TERM, 1925

No. 95

A. G. RISTY, et al, as County Commissioners, etc., et al,

Appellants,

vs.

CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY,

Appellee,

And the Five Other Cases set forth on the cover
page hereof numbered 95 to 100 inclusive.

REPLY BRIEF AND ARGUMENT FOR APPELLANTS.

As a reply to the appellees' contentions advanced in
their several briefs the appellants submit the following:

I.

AS TO THE CONTENTION THAT THE REQUIRED AMOUNT IS AFFIRMATIVELY MADE TO
APPEAR OR EXISTS.

See *Citizens' Bank v. Cannon*, 164 U. S. 319, 17
Sup. Ct. 90.

There is the required affirmative showing, if what

is in effect a concession that no one can tell what the amount will be, constitutes such showing, but not otherwise.

The statute (Sec. 8464), prevents any assessment until there has been the equalization which appellees stopped by injunction. That is the settled law of the State, and the trial Court so ruled. (M. 79, 80).

"Because no one can say what injury will result before an anticipated assessment is completed, there can be no relief before the completion of the assessment."

Western Union v. Howe, (C. C. A.) 180 Fed. 53-54.

The trial Judge made it the settled law of the case that the Board had power to determine what the assessable benefits should be after equalization. (M. 78).

"No one can say what amount is in dispute when no accounting has yet been ordered, much less, that if one should be had that appellant would have a balance large enough. — That is not an affirmative showing of a jurisdictional."

Greene's case, 154 U. S. 668, 14 Sup. Ct. 1193.

"An unaccrued tax cannot be conjectured in order to make up the requisite amount."

Washington Railway, 146 U. S. 227, 13 Sup. Ct. 66.

"The amount may not be based on any contingent loss including what might result from the probative effect of an adverse judgment however certain it may be that such loss may occur."

Ross, 3 How. 771; *New England Company*, 145 U. S. 123, 12 Sup. Ct. 816.

"And it will not avail that decision on the validity of the tax at bar will have effect on future

taxation.”

Holt v. Indiana, 176 U. S. 68, 20 Sup. Ct. 273.

And one appellant (R. brief 24) after contending, as they all do, that the tentative apportionment supplies the amount, naively inquires, “but after equalization how much of an assessment”.

Nor will it avail that there is a total of more than \$3,000.00 to be collected. Rights against third persons, singly or collectively, add nothing to what each appellee may have in dispute.

I-(a).

WRONG PRESUMPTION.

One of the two main arguments of appellee is a disregard of the fact that they enjoined when nothing more than a tentative apportionment had been made — that this no more fixed a tax than an unaccepted proposal fixes a liability. (N. 42; P. 39).

For illustration:

The apportionment as to railroads has already been determined in advance and it is conceded is to be made of the railroad companies. (M. brief 55, 56).

For another illustration:

Argument that because we say we have \$250,000.00 to collect and therefore have a sufficient amount in controversy to entitle us to appeal, no matter what becomes of the total of the tentative apportionment against appellees, we concede that such apportionment gave appellees enough to enter the District Court.

As said, it amounts to a claim (a) that what is purely tentative is fixed, and (b) that it must be presumed the tentative will become the final apportionment

— neither of which positions is sound.

“While some step is still to be taken, the tax cannot be treated as something finally adopted.”

Milheim, 262 U. S. 710.

By enjoining, there was stopped that action which by statute (Sec. 8463) is termed final equalization. It is this equalization which for the first time *fixes* assessment in accord with benefits, and the notice of proposed equalization gives opportunity to be heard on whether the tentative apportionment shall become fixed.

“The apportionment made when appellants were enjoined is only tentative and subject to correction and modification. — *Milheim*, 262 U. S. 710. And it is the equalization which was stopped that ‘completes the assessment’.” — *Western Union v. Howe*, (C. C. A.) 180 Fed. at 53-54.

And there is no right to urge that the tentative is equivalent to the final apportionment. That is presuming that the Board will not correct as justice requires (which the Circuit Court of Appeals did). The presumption runs the other way.

It is said in *First National Bank v. Board*, 264 U. S. 450, 44 Sup. Ct. 387:

“We cannot assume that if application had been made to the commission proper relief would not have been accorded by that body, in view of the statutory authority to receive complaints and examine into all cases where it is alleged that property has been fraudulently, improperly or unfairly assessed”.

It is presumed such tribunal will modify and correct according to the demands of justice.

Milheim v. Moffat, 262 U. S. 710.

Seattle v. Railway, (C. C. A.) 185 Fed. 372.

ACTION TENTATIVE.

Throughout, appellees *assume* the Board was a naked trespasser. Were that so, it is immaterial as to amount in controversy. If tentative apportionment by a trespasser is effective, so is a reduction of the apportionment by the same trespasser.

And even as to an alleged trespasser there is no right to say, before he is asked to change, that a change of mind on his part is impossible.

I-(b).

UNSOUND ARGUMENT.

The remaining argument is (a) that matter anticipated may supply, and thus there has been supplied, the requisite amount, (b) pure guessing and speculation, and (c) mere words. — Also another naive admission that there is no way to tell how much the anticipated injury will reach in money.

First comes a statement which abounds in generality, and in blithe *assumption* that the Board had no power or jurisdiction:

The amount in controversy cannot be questioned. Appellee is threatened with an assessment amounting to (amounts stated) and its property will be so assessed upon its failure to show cause, before a tribunal having no power or jurisdiction, why a levy of that amount should not be spread. (N. 43; P. 40).

Next comes generality plus speculation:

In addition, there is the great and irreparable damage that appellee is threatened with by having its property included within the drainage area. (N. 43; P. 40).

It was not only threatened with the levying of

such a tax but with a further and possibly more dangerous situation — that of having its property included within a drainage district, resulting in the extreme probability of its becoming involved in a project threatening to cause great and irreparable damage to property interests.

If the property is brought within the territory it will be there forever. Future repairs will be assessed. Evidence shows spillway is already being endangered and that time is soon coming when more money will have to be expended for its maintenance.

There is great danger that the new spillway will go out and that there is danger the ditch will have to be closed and the water turned into the original channel. And if it should wash out there is no way in which it can be determined what amount will in future be assessed against the appellees.

In the case of *Washington Railway*, 146 U. S. 227, 13 Sup. Ct. 66, the following allegation was held not to exhibit the requisite amount:

The taxes alleged to be wrongful would be in an amount "which would probably be computed and charged against the complainant and would reach nearly if not quite the sum of \$5,200.00 besides interest and costs."

Finally, "argument" which we are unable to see the meaning or relevancy of:

"The testimony shows the dissimilarity of the property and the theory of the arbitrary assessment so that it clearly appears from the pleadings and the proof that * * * more than \$3,000.00 is involved". (M. 56).

I-(c).

CONSISTANCY.

We are told that *Butte v. Clark*, 249 U. S. 12, is inapplicable because it but holds that litigants must be consistent. It does so hold. We have been consistent, have always urged there was no showing of amount that entitled appellees to enter the District Court. The violation of consistency asserted is, however, that we urge appellees have not shown what amount is in controversy and also that we have the right to appeal because more than \$1,000.00 is in dispute.

I-(d).

CASES DISTINGUISHED.

Butte v. Clark, 249 U. S. 12, and *Western Railway v. Commissioners*, 261 U. S. 264, are cited.

As to the first, it is obvious that it merely holds that a sufficient amount was involved because of facts stated in the opinion which conclusively demonstrate that there was such amount.

And so of the last. It was an injunction halting an order that the railroad construct and maintain a spur track for a shipper. It holds that the sum involved may not be limited to the original cost of construction; that there is involved also the cost of maintenance, and the annual burden of interest on the cost of construction, maintenance and operation — and that all this capitalized at a reasonable rate comes to more than \$3,000.00.

II.

AS TO THE QUESTION WHETHER WE HAVE THE RIGHT TO APPEAL TO THIS COURT FROM THE DECISION OF THE CIRCUIT COURT OF APPEALS.

We have attempted to show that when the bills were filed it did not appear that more than \$3,000.00 was in dispute. It is obvious this may be true and also true that when the decision of the Circuit Court of Appeals came that we would lose more than \$1,000.00 if that decision was not appealed or was affirmed. So much for amount in controversy.

II-(a).

The appellee, Power Company, moved here to dismiss this appeal, and the motion was denied. At least one other of the appellees now moves to dismiss. In support, it presents, in effect, just the decisions that were relied on by the Power Company — and our brief on the Power Company motion fully met those decisions.

That brief is on file in the record of the instant Power Company case, and we beg to refer the court to that brief.

II-(b).

STATEMENT OF SUING PARTY FURNISHES GROUND OF JURISDICTION.

The motions to dismiss urge as ground that since the trial Court made a decision, which was not appealed from, that the objection of unconstitutionality could not be sustained, no federal question *now* exists. In addition to calling attention to it that the Power Company motion was denied, we submit:

Defendants were forced into federal court and five

of the plaintiffs asserted a federal question when they could have entered on diversity alone.

They induced both the lower courts to hold that a substantial federal question had been presented by them and it does not lie in their mouths now to say that it was not substantial.

Appellees thus kept the door open for themselves to go higher and would have claimed that right had they been defeated on the merits. This right must be reciprocal. But they say that defeat on the merits takes away from appellants a right of appeal that appellees made by their bills.

Appellees desire to take away the right to go to this court by one who has lost everything of substance because appellees were defeated and told that their federal question objection, though substantial, was untenable. The argument is that because plaintiffs were mistaken about their federal question, the moral victory of defendants of having this held compels the defendants, who were dragged in, to refrain from a right that appellees always had, and which appellants now need as badly as ever, in spite of their academic victory.

A premium is to be paid the appellees because their assertion of violating the federal constitution was not sustained.

"It is sufficient to render the judgment appealable that the injury may become irreparable by the final judgment or action of the Supreme Court on the judgment."

3 *C. J.* § 276, page 460.

"'The principle of decision' is that the ground of jurisdiction in the District Court and ultimately in this court on appeal from the Circuit Court of Appeals is the statement of the suing party of his cause of suit."

Butte v. Clark, 249 U. S. 12, 39 Sup. Ct. 233.

It may be said in passing, that while appellees contend the federal questions have died, they argue them at great length, seemingly, in the hope of inducing this court to decide them differently than the trial court did.

It is indisputable that some federal questions are still left for decision. These are (a) the dispute over the amount in controversy, and (b) the holding of the lower courts that the federal question presented was a substantial one.

We are at a loss to understand the presenting of *United States v. Jahn*, 155 U. S. 109 (R. 17). It is cited for the proposition that appellants might have gone directly to this court from the District Court, on the jurisdictional question. That may be done only where nothing but the jurisdictional question is to be presented. The *Jahn* case itself is authority for the rule that there should be no direct going to this court where in addition to a jurisdictional question the merits also are decided against a party.

III.

AS TO THE CONTENTION THAT THESE SUITS WERE NOT PREMATURELY BROUGHT.

Little further argument on this head is needed, because of what has been said as to the bearing that inability to say at the time appellants were enjoined how much in money was involved, has on amount in controversy. This inability resulted because nothing tangible had yet been done. That fact demonstrates there was nothing to enjoin.

Additionally —

The appellee, Rock Island, asserts that only a suit in equity can remove a cloud (it is elsewhere shown

there could be no cloud); with this assertion it couples the concession that chancery may function only "once the assessment attaches". (R. 21).

"There may not be relief 'against anticipated injury consequent upon an anticipated assessment before assessment is completed'."

Western Union v. Howe, (C. C. A.) 180 Fed. 53, 54.

The trial Judge ruled and it is universally held that there is sufficient notice if opportunity be given before the assessment of benefits becomes final. — *Erickson v. County*, (N. D.) 92 N. W. 841. — Sufficient if notice is given at any time before the assessment becomes a lien. (As to the City and the Railroads there never could be a lien). *Soliah's case*, 222 U. S. 522. — Which means, by the clearest analogy, no suit in equity should be begun until the assessment has become final. Nothing is certified or filed until thirty days have elapsed from the completion of the assessment. (Sec. 8464).

The suits were prematurely brought because brought before the administrative hearings provided by state law had been gone into, to say nothing of having been exhausted. An appeal after assessment, which the statute provides, could not be foregone and a court of equity entered. — *Milne v. McKinnon*, 32 S. D. 627. There was no right to enter the courts until equalization was exhausted. — *Bagley v. Butler*, 24 S. D. 429.

The view of appellees is that the suits were not premature because there was the right to proceed at once because the board was acting beyond jurisdiction — as to which we say, the record shows and that the highest court of South Dakota settled in the Risty case that the board *had* acquired jurisdiction. Further argument is that appellees had the right to sue when they did, to ascertain whether the board was acting beyond jurisdiction and also attempting to deny due process of law (N. 43; P. 40); that they were under no obligation to wait because the

statutes of the state were unconstitutional — which assumes, that this is so though the trial Judge made a final decision that it was not so, and which disregards the oft repeated decisions that one who does not exhaust administrative relief afforded by state statutes may not urge unconstitutionality or other invalidity. Still further argument is that they had the right to sue when they did because there was improper discrimination — another objection that is waived if the administrative relief is not exhausted. Finally, that there was no obligation to wait because there was no probability that the board would change from the tentative apportionment that had been made. (R. 23, 24). — Which disregards, first, that if this be sound, statute provisions for equalization are idle, and, second, disregards the presumption that the board would change its mind if justice demanded a change in the tentative apportionment.

Another position is an assertion that we have admitted, at least inferentially, that the board intends to make levy and have nowhere said that that was not the intention. (R. 23, 24). It is elementary that no mere threat of assessment will base the chancery jurisdiction. And our alleged intentions are quite immaterial since we were stopped from doing even as much as attempting an equalization.

III-(a).

AS TO THE CITATIONS FOR APPELLEES.

Gast v. Schneider, 240 U. S. 55, reached this court on writ of error and therefore could not involve the question of exhausting the administrative tribunals; and it was a suit to collect a tax already levied. — In *Thomas v. Kansas Railway*, 277 Fed. 708, 261 U. S. 481, the tax had already been levied and the case involved attempt to enjoin the collection of it. In *Kansas City v. Road District*, 256 U. S. 658, the assessment had been

made.

The case of *Milheim*, 260 U. S. 710, furnishes nothing whatever in support of a claim that these suits were not prematurely brought.

III-(b).

NEED FOR HASTE UNEXPLAINED.

Just what hardship appellees would have suffered had they waited with their suits, is not indicated. Nothing is said to show it would not have been just as effective to protect appellees against an alleged illegal tax and its collection had they waited until such time, if ever it came, as found them dissatisfied with the action of the board of equalization.

In a word — the matter is squarely within the holding of *Western Union v. Howe*, (C. C. A.) 180 Fed. 53, 54, that to permit these suits to be brought at the time they were would take away all right of the appellant board to exercise the discretion and judgment in arriving at a fixed and proper valuation which the statutes have confided to it. And that, therefore, the courts may not be entered in anticipation of an assessment before such assessment is completed. We do not overlook the claim that this case is to be distinguished because in it no lack of jurisdiction is involved. As to this we repeat that the lack of jurisdiction in the cases at bar is pure assumption, made contrary to the record and the decision of the highest court of the state.

IV.

AS TO THE CONTENTIONS THAT THE BOARD ACTED WITHOUT OR BEYOND JURISDICTION.

It is important to deal with these contentions because, time and again, positions are taken which have as their premise, or as a material ingredient, an assumption that the Board was not clothed with jurisdiction.

As to the claim that while Constitution authorizes legislation dispensing with corporate entities and gives the power to establish drainage projects to the board (N. 12; P. 12) — the legislature has not availed itself of the grant.

Whether or not the legislature has availed itself of what permission there may be in the Constitution to establish drainage districts, other than those organized for the purpose of draining agricultural lands, is quite academic, for, drainage is an exercise of the police power — *Bemis v. Drainage District*, (Ind.) 105 N. E. 496. Under that power there is authority to establish drainage projects though they be not for the draining of agricultural lands, unless the Constitution forbids the establishment of such districts — and that is not claimed for the Constitution of South Dakota.

It is settled by the highest court of the state that no constitutional amendment was needed; that the constitutional provision merely made the drainage of agricultural lands something done for a public purpose or use, and that so far as establishing drainage conducive to the public health, convenience and welfare was concerned, there was power on part of someone to do this before said constitutional provision was adopted. — *Tuthill v. MacMackin*, 31 S. D. 507; and see *Fallbrook's* case, 164 U. S. 112.

The relevant constitutional provision is Section 6 of Article 21. It does permit the drainage of agricultural lands, by declaring that such drainage is for a public purpose. But to permit this is of course no exclusion of any drainage project that is, and before the adoption of this constitutional provision was, something for a public purpose. It will not be seriously contended that a drainage system which is conducive to the public health and welfare is not something provided for a public purpose and public use, even though it does not touch an acre of land being used or being useable for agricultural purposes.

After so dealing with the drainage of agricultural lands the Constitution next says that the legislature may provide for the organization of drainage districts for the drainage of lands "for any public use"; and that it may vest the corporate authorities of counties, etc., with power to construct levees, drains, and ditches, paying therefor by special assessments on property benefited thereby, according to benefits received.

The sole question then is (if it be material) whether the legislature has availed itself of this grant, which we concede is not self-executing. Section 8458 R. C. 1919, provides that the board "may establish and cause to be constructed any ditch or drain * * * * whenever such ditch, drain, or water course shall be conducive to the public health, convenience and welfare".

The highest court of the state has settled that the legislature *has* availed itself of the power granted by the Constitution; that the grant authorized the legislature to select who should have authority to construct drainage projects, and that it had selected the boards of county commissioners. — *Davidson v. Tile Company*, (S. D.) 196 N. W. 96; *Tuthill v. MacMackin*, 31 S. D. 507; and *Gilseth v. Risty*, 46 S. D. 374.

IV-(a).

ULTRA VIRES.

As to the claim the board acted *ultra vires* because the appellees owned no agricultural lands, and that the power of the board was limited to draining such lands.

First — it is not essential the benefits shall be for agricultural purposes. It suffices that a district is organized for that purpose. — *Commissioners v. Commissioners*, (Ill.) 21 N. E. 207.

But it is obvious the board is not limited to the drainage of agricultural lands, (1) because the Con-

stitution does not attempt so to limit it, and (2) because Section 8458 availing itself of the grant of power in the Constitution gives the board power to establish and cause to be constructed "any" ditch or drain, etc. (a) whenever it finds the same to be conducive to the public health, convenience or welfare, and having thus provided adds in the alternative — (b) "or" whenever the same shall be for the purpose of draining agricultural lands. Nothing can be dealt with as being exclusive when it is obviously but an alternative to something else.

It has been settled by the highest court of the state that the power of the board is not limited to the drainage of agricultural lands but extends to any drainage project so long as same is conducive to the public health, etc. — *Tuthill v. McMackin*, 31 S. D. 507; *Davidson Co. v. Tile Co.*, 47 S. D. 101; *Drainage Ditch No. 12*, 44 S. D. 157.

"Drainage for public purpose includes drainage for farm lands but under Constitution and law the only limit as to benefits is a drainage district constructed and paid for by special assessment on property benefited, without regard to the nature or kind of property."

Commissioners v. Commissioners, (Ill.) 21 N. E. 207.

The state Constitution (Section 6, Article 21) permits assessment for benefits to the "property" benefited. Sec. 8463, to "the lands affected".

"It is not essential that the land be in use for agriculture."

Milne v. McKinnon, 32 S. D. 627.

"It need not be absolutely worthless and incapable of growing anything."

Fallbrook v. District, 164 U. S. 112.

IV-(b).

POWERS OF THE BOARD.

The assertion that jurisdiction was lacking has many details other than those that have been adverted to. We are told the board had no power to determine whether any benefit was being produced by the project, nor the extent of the benefit. The highest court has declared that it had jurisdiction to deal with both. — *Milne v. McKinnon*, 32 S. D. 361. Next, that there is no evidence that the Great Northern and the Power Company ever received any benefit. (Briefs N. 46; P. 42). Surely that is an evidentiary question that does not go to jurisdiction but is to be determined by resort to the administrative tribunals provided. Next, that the threatened assessment was excessive. But as said in *Curtiss v. Pound*, 34 S. D. 628, 630, that only results in making an assessment larger than it should be, does not go to jurisdiction and must be corrected by resort to said tribunals. Next, that there was no power to assess the appellee Power Company, for in that, the statute permitted dealing with "lands" affected and with tracts of land only, and that what the Power Company possessed was neither lands nor tracts of land. The railroad company appellees make a similar argument. All overlook that under Section 8463, benefits may be taxed against *any* property. So of Section 8464. So of Section 6 of Article 21 of the South Dakota Constitution. And that this is the range of assessment is held in *Milne v. McKinnon*, 32 S. D. 361. But the Power Company concedes (Brief 2) it owns "real property" consisting of a hydro-electric plant, dams, property rights and water rights. It is declared in Sections 256 and 257, South Dakota R. C., 1919, that real property is land or anything affixed to land or anything incumbent or appurtenant to land, anything that is in law immovable; any solid material of the earth whatsoever, as sand, soil, rock, or other substances.

It was said in *Kimberly v. Hewitt*, (Wis.) 44 N. W. 303:

"It may be conceded that a water power used or unused is included within the meaning of the word 'land'."

In *Carey v. Daniels*, 8 Metchalf, 866:

"Right to the use of the flow and fall of water on land of the proprietor is not an easement. It is inseparably connected with and inherent in the land; is a part of the inheritance and passes with it."

And see *Edwards*, 180 Ill. 99; *Philadelphia Trust Co.*, (N. J.) 69 Atl. 729; *Swain*, (N. H.) 85 Atl. 288.

The appellee Rock Island, concedes (Brief 35) that the board did have jurisdiction to determine what the amount of assessment should be. It is ruled in *Erickson v. County*, (N. D.) 92 N. W. 841, that such boards as this have jurisdiction to apportion benefits. And to assess them; and that the courts will not inquire into the correctness of their determination. (92 N. W. 848). It is ruled in the *Gilseth* case that the filing of the petition gives jurisdiction to inspect and survey and that the filing of the surveyor's report gives power to fix time and place as to the hearing of the establishment of the project.

It is also argued that power to do what was done was lacking because there having been no abandonment of the old ditches there was no right to add new territory or to make a new and larger ditch system on the lines of the old, even if the new project doubled the capacity of the old — meaning that if a plow ditch was made, it must remain all the drainage its territory can ever have.

There was power to determine what lands would be benefited. — *Erickson v. County*, (N. D.) 92 N. W. 841.

842, and to apportion the cost. — *Idem* — and in the absence of fraud there was jurisdiction to determine what lands should be included and assessed, and an honest mistake in this regard would not open the doors of the courts for redress. *Idem* 848.

This overlooks the authority given in Section 8458, under which the Board is given the same and equal authority to do *three* things, viz.: (1). "May establish and cause to be constructed any ditch"; (2). "May provide for the straightening or enlargement of any watercourse or drain previously constructed"; and (3) "May provide for the maintenance for such ditch, drain or watercourse"; all this "whenever such ditch, drain or watercourse shall be conducive to the public health, convenience or welfare", included in which is the drainage of agricultural land.

The Power of the Board, the method to be pursued, etc., when providing for *straightening or enlargement of any water course or drain* previously constructed, is governed by Section 8476, which says: -

"But no proceedings affecting the right of persons or property shall be had under this section, *except upon notice* and the other procedure prescribed herein for the construction of drains."

This provision places the straightening or enlargement of any watercourse or drain previously constructed in the same class or category as an original drainage project, and the procedure is governed by Section 8459 to 8468, inclusive, as well as subsequent sections applicable to a new drainage project, and authorizes the inclusion and assessment of all property benefited, whether in the old drainage district or not.

Most of the important positions taken by the appellees on this head are squarely negatived by *Tuthill's* case, 31 S. D. 507, and emphatically so by *Gilseth v. Risty*, 46 S. D. 374. In the last named case the Court said:

"It is contended by the appellant that the project contemplated by the petition was not the creation of a new drainage district or a new drainage ditch, but merely to repair a project already in operation, and that, therefore, the board was without authority to proceed. But this contention is not tenable."

"The two projects were by no means identical. The drainage district involved in this case contains a materially larger area than the combined area of the two old ditches."

"No fraud or bad faith on the part of the Board has been shown."

The authority to build enlarged ditch over line of old ditch is supported by the following decisions:

In re Sorenson Drainage Ditch, 27 S. D. 342.

In re Judicial Ditch No. 8 v. Nelson, (Minn.) 163 N. W. 135.

Steensburg v. Kyle, (Ind.) 121 N. E. 537.

C. & N. W. Ry. Co. v. Board, (Ia.) 172 N. W. 443.

For that matter there is neither plea or proof of fraud or bad faith. As to this, one appellee concedes that though it charges bad faith that possibly the board had no bad intentions. (P. brief 23, 24). The claim that there is "ample proof" on this head (P. 29) seems to rest on the fact that those who became the petitioners first attempted other projects and went into this new one as a result of compromising. (P. 29). If compromise as an antecedent constituted fraud most things that have been accomplished after negotiation are fraudulent. At worst there is nothing pleaded or proven beyond honest mistake — which of course will not suffice. — *Southern Railway v. Watts*, 260 U. S. 519. And the fraud that would avail must be of a character to have kept the complainant from making full and fair presentation of its side — which

of course cannot be claimed here. — *Toledo Company v. Scale Company*, 261 U. S. 423.

IV.-(c).

NEW ENLARGED DRAINAGE.

The *Gilseth* decision is addressed to the project at bar. And it should be said, in passing, that some of the appellees have conceded that this was a new and independent project.

It is held in *People v. Mayor*, 4 N. Y. 419, and *Roberts v. Smith*, (Mich.) 72 N. W. 1092:

“There never was any just foundation for saying that local taxation must necessarily be limited in or co-extensive with any previously established district.”

And while *Thornton v. Road District*, 291 Fed. 520, has some language in line with the contention of appellees on this head, the exhausting of administrative tribunals is not mooted.

We are not overlooking the avoidances. We are told that the *Gilseth* case is inapplicable because *Gilseth*, unlike most of the appellees, was in the old drainage area, but the decision was in no manner based upon it. It is pointed out that *Gilseth* joined in the petition, was present at the hearing and took no appeal from establishment. (Briefs N. 46; P. 42). The City of Sioux Falls is also in the old drainage area, its representatives too were present at the hearing, and while the appellees other than the City, did not join in the petition nor appeared at hearing on it, we shall show in another connection that they too are as much estopped as though they had done what the City did. But like *Gilseth*, neither appellee appealed from the establishment of the project, which appeal certainly would have enabled them to test whether or not their property should be included

and whether or not the establishment was a mere pretense and subterfuge. We concede that constitutionality was not challenged in the *Gilseth* case; but jurisdiction was. And there was a flat holding that the board had acquired jurisdiction.

Finally, it is argued (Brief N. 47; P. 43) that the real decision in the *Gilseth* case is first, that there was no protest when *Gilseth* saw the work performed. Assume for the sake of argument, that that is the holding. Neither appellee objected to the work — and their agents saw it going on and some of them furnished help to carry it on. It is strenuously insisted that the *Gilseth* decision turns wholly on the fact that *Gilseth* was held to be estopped. Any examination will make it clear this position is untenable. What is stressed is that there had been no appeal from the order of establishment and that, therefore, injunction would not lie to stop the carrying out the work contemplated by the petition. True, after the Court had declared that the board had jurisdiction and stressed the failure to take appeal it also found that *Gilseth* was estopped. That was purely a cumulative holding and the case makes plain the court had no thought of resting decision on this estoppel; that the main inquiry was whether or not the establishment and the proceedings of the board were valid and done within jurisdiction. Surely the estoppel cannot take first rank in the decision. At best for appellees it is only one ground of decision. And it is elementary that though more than one point is decided that does not make any particular point decided a *dictum*. (See our original brief, pp. 110, 111, 112). If that were not so, every decision having more than one point would be *adictum*, *in toto*. Every litigant could pick out one of the points and say it was *dictum*, because other points were decided. His opponent might select other points decided as being alone of the essence of the decision — and as said, the effect would be that nothing would be a *decision* unless the court limited itself to passing upon some one single point.

IV-(d).

LACK OF JURISDICTION NOT SUSTAINED BY DECISIONS.

There is nothing in *Milheim's* case, 262 U. S. 710, which justifies a claim that this board lacked jurisdiction. It is not limited to a holding that where the jurisdiction of the assessing authorities is not challenged, there is no right to restrain in federal court where the only complaint is that an erroneous method of assessment or assessment on a wrong standard are involved — in other words, is not limited to cases where the taxing authorities have jurisdiction and the complaint is that an *ad valorem* basis was and should not have been used.

"The Constitution violations were charged to be (a) that the purpose of the act is not public in the sense warranting the exercise of the power of taxation, but is essentially private; (b) it authorizes the imposition of the entire taxes upon the lands within the district, without regard to and relation to the tunnel or the benefit to be derived from it, and, there being no special benefits to such lands justifying such taxation is entirely arbitrary; and (c) that the commission has arbitrarily and unreasonably adopted an *ad valorem* basis for the appraisal and apportionment of benefits to the several parcels of lands within the district without reference to the actual benefits to each."

So of *Keokuk v. Salm*, 258 U. S. 122. It does not hold that such boards as this have power to act only in cases where nothing is involved but the amount of the tax. It does speak to such a situation, but only to say that if that be all that is involved there can be no relief in equity without tender of amount confessedly due or what may be found to be due in justice and equity.

In the guise of a concession it is said we might be right in asserting there should have been no enjoining if nothing were involved but irregularities in procedure

or dispute over amount. Thus is produced as assumption that the *Gilseth* case and others cited by us were decided as they were because nothing was involved beyond mere irregularities in procedure or dispute in amount. That is not a proper limitation upon these decisions.

V.

THE SUBSTANCE OF ATTACK AS PRESENTED IN THE ARGUMENTS FOR THE APPELLEES, IS ASSERTION THAT BOTH STATUTE LAW AND CONDUCT OF THE BOARD WERE VIOLATIVE OF THE CONSTITUTION OF THE UNITED STATES.

Assuming for the sake of argument that there is the requisite amount in controversy, still, appellees are not entitled to relief on the ground of unconstitutionality or other invalidity, because —

(a). Their bills do not raise the objections that their arguments do.

(b). The trial Judge ruled that there was no violation of the federal Constitution, or of any other. Appellees have not cross-appealed. And the Circuit Court of Appeals left the constitutionality question where the trial Court had put it. This means it is the settled law of the case that there is no unconstitutionality here presented — and though it be assumed appellees presented a federal question that might in reason be urged, the constitutional objection could not be sustained — that while the objection may have given the right to be heard by the District Court the hearing had is final on the point, and there is no constitutional question that can now be argued or ruled in favor of appellees.

(c). The failure to exhaust the administrative

tribunals provided by statute, estops appellees from urging unconstitutionality, fraud or other invalidity.

(d). They are estopped by conduct and silence to question constitutionality or other illegality or invalidity.

(e). If all else be passed, there was no unconstitutionality or other invalidity or illegality.

V-(a).

AS TO THE PLEADINGS.

First — is a blanket allegation that the *statute law* violates the federal Constitution. Then, that —

If the apportionment of benefits be made, as threatened, it will constitute taking of property affected by the notice given, without due process of law.

So far — a blanket attack on *statute*, and another that threatened action will violate the due process clause.

There is further allegation for which it seems to be claimed it raises infringement of the equal protection clause of the *Constitution of the United States*. If it is to be held there is a reference to *that* Constitution, it must be because, in the beginning, it is said in terms that the statutes violate that Constitution, and because the allegations next to be set forth begin with, "it is further unconstitutional and void". Those allegations are:

It is further void and unconstitutional because it provides no fixed and determinable method or rule for the apportionment of benefits upon the property and property owners situated within said drainage area, and especially that it does not fix

one for the apportionment of benefits upon the property of railroad companies and other corporations and municipal corporations. (Par. 22, P. 15 — M).

It will be noted that the *Constitution of the United States* is not mentioned. This does not meet the strictness with which federal questions must be pleaded. True, the pleading *may* be a charge that the Federal Constitution has been violated. But as the Constitution of the state has the same guaranties, the pleading *may* be addressed to a violation of those. Indeed it is elsewhere urged by the other appellees that the state Constitution *has been* violated. The trial Court ruled that the statute law does lack fixed and determinable method or rule for apportionment of benefits, and especially so as to apportionment to railroads and municipal corporations. But it did not so much as suggest that the Constitution of the United States had been disregarded. And the Circuit Court of Appeals declined to pass on constitutionality, at all.

Up to now, there is not a word about improper conduct — and no claim or ruling that any conduct violated *any* Constitution. Then comes an amendment to the bills (M. 74). The nearest it comes to intimating a constitutional question is by allegation that —

Said equalization of benefits is so arbitrary and discriminatory against the property of plaintiff as to deprive it of its property without due process of law and of the equal protection of the laws.

Which, as said, may refer to the Constitution of the state. As for the rest — conduct is attacked, as follows:

The equalization of benefits out of the total number is estimated at a sum greater than three thousand dollars.

This equalization is wholly speculative, arbitrary, unjust, illegal, and discriminatory, and was made by the board without any reasonable and ra-

tional basis therefor.

It is not in proportion to any benefit which the property of plaintiff has received or ever can receive by what is proposed to be done

Its property has not been and never can be benefited by the work performed by the board to the extent of said estimated amount or to any extent.

The assessment sought to be collected from plaintiff is out of all proportion to the assessment sought to be collected from the agricultural lands situated north of the city of Sioux Falls and within the drainage area of the new ditch.

And, as said, neither of the lower courts ruled that as to the matter so pleaded there had been any violation of the Constitution of the United States.

We are not overlooking that the appellee City alone is concerned with the absence of Federal question; that the other appellees, having diversity, may have decision of non-federal questions. At this point we but assert that no plaintiff is entitled to more than he pleads; that on appeal by his opponent plaintiff can have nothing added to what the lower court gave him, and that anything that has become the settled law of the case binds him on appeal by his adversary.

VI.

WHAT HAS BECOME THE SETTLED LAW OF THE CASE BECAUSE OF DECISION BY THE TRIAL COURT, NOT APPEALED FROM, NOR TOUCHED BY THE CIRCUIT COURT OF APPEALS.

Starting with the premise that nothing has been declared unconstitutional, what the trial Court has settled negatives the allegation that the statute is further unconstitutional and void because it provides for an assessment against property without the right of the

owners to be heard thereon and without notice of any kind to him. It has been made the settled law of this case, binding on this appeal, as it should have been on the Circuit Court of Appeals:

1. It has so become settled that the "general" notice, saved from the Fourteenth Amendment — and that there was such provision for notice at some time before any assessment could become final, or a lien, as that there was no denial of due process. (M. 79, 80). — On which the trial Court is sustained by the statutes of the state and such decisions as that of *Soliah*, 222 U. S. 522; *Gatch*, (Iowa) 18 N. W. 314; and *Ford*, (Iowa) 45 N. W. 1034.

2. Settled it was an unjustified claim that no notice to railroads and municipal corporations was provided for. (P. 37). Or that there was no provision for notice to cities or railroad corporations of either apportionment or equalization.

3. That notice provided was proper though it did not name all those to be affected, and that though it was not required to name them, the notice of equalization was required to and did give a detailed description of the property, including that of the railroad appellees. (Section 8463). *Curtis v. Pound*, 34 S. D. 628.

4. It is so settled that no appellee was mislead because notice did not name it; nor because it did name some appellees. (R. 19, 21; P. 19). Nor mislead by the alleged fact that the notice spoke only of tract owners and tracts of land (P. 36; R. 32, 33) — the fact being that the notice of equalization gave name, owner and definite and specific tracts by specified section, township and range — and the appellee, Rock Island, was not mislead by a notice (and it is not the fact that there was such a notice) which gave no information beyond describing the land through which the ditch would pass, though it is true same did not de-

scribe property of the Rock Island, nor advise it that its bridges would be assessed. (R. 28).

5. No one was mislead into believing that nothing would be assessed except agricultural land. (N. 21; P. 20). — Or into believing there was to be no enlargement of the area of the already constructed older ditches.

6. It was expressly settled that the notice provided complied with constitutional requirement (M. 77) — and with the South Dakota statutes.

7. Involved in this finding is a denial of the contention that the notice was bad even if it be assumed to be good in itself because no statute provided for such notice as was given (which however is not the fact) — and such alleged "fact" is not material — see *Paulson*, 149 S. U. 30; *Tripp v. Yankton*, 10 S. D. 516; *Page and Jones, Taxation*, Sec. 135 and cases cited.

And so of the claim that there is a fatal defect as to notice because it was given without preceding action by the board. (N. 20; P. 19).

8. There was opportunity by Sections 8463 and 8464 to present whether the cost was greater than the benefit. (N. 9; P. 9, 20). And the trial Court so ruled. (M. 76).

9. There was due opportunity to contest all that is to be set forth in the petition to establish. (Sec. 8459).

10. To contest establishment, but opportunity to contest is not limited to that.

11. To contest all that is required to be set forth in the report of the surveyor, required to be filed. (Sections 8459, 8461, 8462).

12. To contest the finding of the board on width and route. (Same statutes).

13. To contest whether the proposed system is conducive to the public health, convenience and welfare. (Same statutes). — Or is necessary and practicable for agricultural purposes. (Same statutes).

14. To contest as to what lands should be included. (M. 76; R. 35; N. 21; P. 20).

15. It is so settled there was due opportunity to be heard on whether there should be a tax at all (N. 9; P. 9) — on whether the proposed tax was valid and just. (M. 81, 82; N. 8; P. 7).

16. Opportunity to be heard was not limited to the amounts to be apportioned. (N. 21; P. 20). And there was due opportunity to be heard on the amount of tax (M. 81; N. 9; P. 9) — on whether same was after equalization, confiscatory. (M. 78; R. 30, 35).

17. Opportunity to show that owner was not being benefited (N. 21; P. 20); or not as much as assessed for — and see *Hennessey's case*, (Wis.) 74 N. W. 985; *Soliah*, 222 U. S. 522; *Milheim*, 262 U. S. 710; *Paulson*, 149 U. S. 30; *Spencer*, 125 U. S. 345.

The trial Court so ruled. (M. 82).

18. There was opportunity under Section 8463 to present the objection that action was taken before cost was known and that cost exceeding benefit resulted. (R. 29).

19. There was opportunity to have determined whether the proceedings had been illegal. (R. 29).

By way of avoidance it is said the decision of the trial Court is sound only where the legislature fixes the boundaries and what is the amount of benefit. The only difference between the doing of this by the legislature

and doing it on delegation is that in the first case notice is not required and in the last it is. And that is all that is held on this point by *Spencer v. Merchant*, 125 U S. 345, and *Road District v. Railway*, 275 Fed. 600. It is obvious, then, that the decision holding there was due notice is not irrelevant.

Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct., 1064, holds only that an ordinance which attempts to keep men from pursuing a lawful calling except on permission, is unconstitutional.

VI-(a).

RULING OF TRIAL COURT.

What was settled by the trial Court as to the objection of unconstitutionality (N. 47; P. 43; R. 25) is fairly well presented by the following extracts from its opinion:

"Without repetition, and calling attention now to the reasons urged by plaintiffs sustaining the unconstitutionality of the statute enacted for the purpose of draining agricultural lands, and considering the objections urged in various forms by the different plaintiffs, we find that all of the objections center about the criticism that no notice is provided the owners of land affected by the drainage ditch except the general notice, and in fact, no personal notice until the date fixed by the board for the equalization of proportional assessments for the various tracts of land benefited by the drainage." (M. 79, 80).

"In my judgment the South Dakota statutes enacted in the light of that provision of the Constitution of the State providing for the drainage of agricultural lands is constitutional." (M. 83).

"The statutes of this state do not provide for the description of the lands alleged to be benefited

by the ditch, or the owners of the lands, or that notice shall be given to such owners, or that the owners shall appear and show cause if any they have why the ditch is not practicable or should not be established, or have the opportunity to show that the cost would be greater than the benefits, or would be confiscatory, and yet, I am satisfied that the courts of the various states and the Supreme Court of the United States have recognized the power of the legislature to provide the method of the levying of this tax against the lands benefited by a drainage ditch, and have held that a law that provides for notice and an appearance and the right to contest the amount of the tax, and to contest the right to tax at all, with the right of appeal therefrom, if given to the land owners prior to the time that a tax is levied, and becomes effective, is 'due process of law'." (M. 80).

He then holds that this general notice is constitutional:

"I repeat that under the South Dakota statute there is ample provision for notice to every land owner and an opportunity given to be present at the hearing at which time and place he may assert all objections against the validity and justice of the proposed charge upon his property before the tax is levied and carried by the county auditor as such on the books of his office and made a lien upon the property." (M. 82, 83).

VI-(b).

RULINGS NOT APPEALED FROM, FINAL.

Argument on errors against appellee will not be considered.

3 *C. J.*, pp. 1404-1405.

The review is limited to the assignments of the appellant.

U. S. v. Blackfeather, 155 U. S. 180.

The appellee cannot complain of any adverse ruling.

Bolles v. Outing, 175 U. S. 262, 268.

Guarantee Co. v. Ins. Co., 124 Fed. 172.

Canter v. Ins. Co., 3 Peters 307, 318.

Pauly v. Co., (C. C. A.) 62 Fed. 698, 703.

Can urge no issue founded on errors below.

Guarantee Company, supra.

It is the long settled rule that appellee will be heard only in support of the decree as it stands.

London v. Dist., 104 U. S. at 774.

The Stephan Morgan, 94 U. S. 599.

The Maria Martin, 12 Wall. 31, 40.

Guarantee Company, supra.

The William Bagaley, 5 Wall. 412.

Where a plaintiff also has grounds of complaint in respect to judgments in his favor he may cross-appeal if the defendant has appealed or independently if defendant has taken the case directly to the Supreme Court on the question of jurisdiction only.

United States v. Jahn, 155 U. S. 109.

Though an error might be held to be fatal were there cross appeal, without such appeal appellee can

not take advantage of such error, and the matter stands as if he had waived the error at the hearing.

Chittenden v. Brewster, 69 U. S. at 195.

VII.

THE APPELLEES ARE ESTOPPED FROM ASSERTING UNCONSTITUTIONALITY OR OTHER ILLEGALITY BECAUSE THEY HAVE NOT MADE USE OF THE ADMINISTRATIVE TRIBUNALS PROVIDED BY THE STATE STATUTES.

If it is the law that those who do not exhaust the avenues of summary and administrative relief provided by the state may not enter court to complain of *any* invalidity including unconstitutionality, it is idle to argue upon whether there is invalidity. And such is the law.

It is bottomed on the presumption that such tribunals will see that no wrong or injustice is done the ones sought to be taxed. — *Milheim*, 262 U. S. 710; *First National Bank v. Board*, 264 U. S. 450.

In the case of *Milheim*, it is stressed that the apportionment of taxes was "subject to correction and confirmation after hearing the property owners affected".

"The ultimate test is that there be some tribunal especially fixed by statute with the power of equalization, which power it may assert at the instance of anyone aggrieved".

First National Bank v. Board, 264 U. S. 454; 44 Sup. Ct. Rep. 387.

Must exhaust administrative tribunals before

raising any question in court.

Fallbrook v. District, 164 U. S. 112.

Making no complaint before the reviewing board is an admission that the action of the assessing board is correct.

Hinds v. Township, (Mich.) 65 N. W. 546.

In these administrative tribunals relief may be had as to the finding on any matter alledge in the petition.

People v. Hagar, 52 Calif. 183.

Bigelow Estoppel, page 142.

Freeman Judgment, Section 523.

Ward v. Alsop, (Tenn.) 46 S. W. 575, 576.

And this is so because of Section 8459 and others.

And see *Fallbrook v. District*, 164 U. S. 112.

The one deeming himself aggrieved must appeal.

Milne, 32 S. D. 627 — and it is only where no appeal is permitted that the courts may be entered.

Bemis v. Drainage, (Ind.) 105 N. E. 497.

The scope of the appeal permitted by the South Dakota statute permits review of all that appellees complain of, and the alleged grievances are dealt with as in original action. Section 8469 Code 1919; *In re Sorenson*, 27 S. D. 342.

The constitutional guaranties of due process of law in *Const. Bill of Rights*, § 21, requiring just compensation for private property taken for public use, are not absolute but are subject to the right of the state to modify or appropriate when public necessity or welfare requires, under the police power, the taxing power, or the

power of eminent domain.

Bemis v. Guirl Drainage Co., (Ind.) 105 N. E. 496.

The taxing power being reserved to the states, they may control method, manner and detail of fixing, apportioning, equalizing and collecting tax — method of determining same, and the agencies by which the proceedings are to be carried on.

And the exercise of these powers presents no federal question.

Davidson, 96 U. S. 97.

Spencer, 125 U. S. 345.

Walston, 128 U. S. 578.

Hagar, 111 U. S. 701.

Lent, 140 U. S. 318.

Fallbrook, 164 U. S. 113.

French, 181 U. S. 324.

Mt. Cemetery, 248 U. S. 502.

They have power to prescribe as to kind of notice to be given to avoid due process clause — courts may not question either method, manner or kind of notice provided — and notices containing less than the one at bar and not naming the parties affected have been repeatedly held to satisfy the Fourteenth Amendment.

The failure to appeal gives jurisdiction to proceed — and as to anything done with jurisdiction there may not be collateral attack.

Erickson, (N. D.) 92 N. W. 848.

VII-(a).

To speak more in detail.

For illustration, the following objections may not be raised by one who has not exhausted the administrative

tribunals created by state statute.

That the land of the complainant should not have been included.

Embree v. District, 240 U. S. 242.

For, if it was not intended to afford a hearing on inclusion there was no purpose in the provision of Section 8462 for contesting the statements of the petition with reference to the "territory affected"; or in requiring notice to describe the tract of land likely to be affected.

Unconstitutionality only works invalidity and may not be raised by those who have not entered the administrative tribunals.

Union Pacific v. Commissioners, (C. C. A.) 217 Fed. 544.

Milheim v. Moffat, 262 U. S. 723.

Martin v. District, 205 U. S. 135.

Farncomb's case, 252 U. S. 7, 11.

So of fraud.

Union Pacific v. Commissioners, (C. C. A.) 217 Fed. 544; — and whether the property has been fraudulently assessed.

First National Bank v. Board, 264 U. S. 455. This on the reasoning that being tainted with fraud only works that the tax is invalid. — *Shelton v. Platt*, 139 U. S. 591; *Union Pacific v. Commissioners*, *supra*.

That the assessment was illegal.

Ward v. Alsup, (Tenn.) 46 S. W. 575.

That it was improper.

First National Bank v. Board, 264 U. S. 450.

Ward v. Alsup, (Tenn.) 46 S. W. 575.

That the assessment is unjust and unwarranted.

Curtiss v. Pound, 34 S. D. 633.

Petoskey, (Mich.) 127 N. W. 345.

Michigan Bank v. City, 107 Mich. 246.

That the assessment was unfair.

First National Bank v. Board. 264 U. S. 450.

That the assessment was disproportionate and unequal, as between those sought to be taxed.

Bagley v. Butler, 24 S. D. 429.

Spencer v. Merchant, 125 U. S. 345.

Township v. Rose, (Mich.) 53 N. W. 928.

That the assessment is excessive.

Curtiss v. Pound, 34 S. D. 628, 633.

Hinds v. Township, (Mich.) 65 N. W. 546.

Township v. Rose, (Mich.) 53 N. W. 928.

Ward v. Alsuf, (Tenn.) 46 S. W. 575.

Southern Ry. v. Watts, 260 U. S. 501.

Whether it was illegally excessive or irregular and excessive.

Stanley v. County, 121 U. S. 535.

Ward v. Alsup, (Tenn.) 46 S. W. 575.

Or excessive through over-valuation.

Stanley v. County, 121 U. S. 535 — a question not for the courts.

Spencer v. Merchant, 125 U. S. 345.

Whether there is any benefit or to what extent it is benefited.

Milne v. McKinnon, 32 S. D. 361.

Fallbrook v. Dist., 164 U. S. 112.

Soliah v. Heskin, 222 U. S. 522

Resolving a conflict on whether lands included would be benefited.

Pittsburgh Ry. v. Backus, 154 U. S. 421.

The courts may not be entered in the first instance to determine whether either statute or administration of it is arbitrary or the method is so arbitrary as that a wrong must result.

Milne v. McKinnon, 32 S. D. 627.

Martin v. District, 205 U. S. 135.

Keokuk v. Salm, 258 U. S. 122.

Even if it be fraudulent discrimination caused by over-valuation.

Milheim v. Moffat, 262 U. S. 710.

At this point the attention of the court should be called to the fact that all complaint of arbitrariness in assessment falls flat where the one complaining prevented equalization. One may not presume that the assessment would have remained unequal, disproportionate or arbitrary after equalization had been had. One unconscious piece of humor in which appellees indulge is urging that the equalization was arbitrary, unfair, etc., when through their own act there was no equalization. It should further be noted the burden was on the plaintiffs to show unconstitutionality, and neither of the lower courts found any unconstitutionality. Further, the evidence does not sustain the complaint.

And the courts may not be appealed to in the first instance on a complaint that the appellees should not be taxed because they were not the owners of agricultural lands.

VII-(b).

CASES DISTINGUISHED.

As to the citations by appellees and their attempt at distinguishing of citations on our part —

The case of *Abernathy*, 274 Fed. 801, is not authority on non-existent taxes because it involves a controversy where in the *tax bills had already issued*. In *Board v. Pipe Line Company*, 292 Fed. at 474, there was involved resistance to a proceeding "to collect unpaid levy taxes", and the matter of exhausting administrative tribunals is not mooted. Nor was this mooted in *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187; nor in the *Milheim* case, 262 U. S. 710. The matter of exhausting the administrative tribunals could not arise in *Myles v. Board*, 239 U. S. 474, nor in *Gast v. Schneider*, 240 U. S. 55, nor in *Kansas City Railway v. Road Improvement District*, 256 U. S. 658 — because each of these cases went through the state courts and were considered in the Supreme Court only on writ of error to the respective highest court of the states.

The case of *Milheim v. Moffat*, 262 U. S. 710, is not distinguishable on the ground that in it no lack of jurisdiction was asserted, because the case at bar is just in that situation. For a conclusive showing that jurisdiction has attached is at least equivalent to a failure to assert lack of jurisdiction. (N. 45; P. 41).

Keokuk v. Salm, 258 U. S. 122, is not well distinguished. At any rate the construction that appellees give it differs from the analysis given the case in the matter of *Bohler*, numbers 170, 171, October Term, 1924. The Supreme Court says the *Keokuk* Decision declining to enjoin should be sustained because the assessment was subject to revision by a board of review which was required to give a hearing and to correct the assessment as should appear just; that the payment of taxes was not to be enforced (as here, except as to the Power com-

pany) by distraint or levy but by legal proceedings in a civil suit for the collection of a debt wherein any defense including discrimination could be made; that complainant brought his bill without taking any of the steps offered by the statute as an administrative body — and the *Bohler* case sustains itself on the ground that the state statutes provided no remedy against excessive assessment other than by petition in equity and that, therefore, those who had the right to enter the federal court at all might do so with a petition in equity.

The *Soliah* case deals with a statute which for one thing had provision for a suit to recover back. From that fact appellees deduce that the *Soliah* decision rests on that fact. What it holds is that where ample provision for administrative review is made the courts may not be entered in the first instance. It nowhere holds that equity has not jurisdiction because of this provision for a suit to recover back but merely that such provision is one reason why there was an adequate remedy at law. It does not hold that such provision is the only adequate remedy at law which will deter the court of equity from acting. It stresses this one provision no more than the fact that general review in administrative tribunals is provided. And *Ward v. Alsup*, (Tenn.) 46 S. W. 575, holds that though there be provision for suit to recover back the courts may not be entered in the first instance without exhausting the administrative tribunals.

VII-(c).

NON-RESIDENT MAY ENTER FEDERAL COURT ONLY WHEN
CITIZEN MAY ENTER STATE COURT.

It was ruled in *Reagan v. County*, 154 U. S. 362, and followed in *Smyth*, 169 U. S. 466, 517 and *Sheffield*, 149 U. S. 574:

“Whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state

may invoke the jurisdiction of the federal courts to maintain a like defense'. *A state cannot tie up a citizen of another state having property rights within its territory invaded by unauthorized acts of its officers to suits for redress in its own court.*"

The italics are those of appellees, and indicate they deem the matter within the rule that the state may not, directly or indirectly, keep one out of federal court who by federal law has the right to enter it — a sound piece of law, but utterly irrelevant. What they should have italicized is, "whenever a citizen of a state can go into the courts of a state". In other words, diversity will not open the federal courts to a suit which the resident may not bring in the courts of his state. Where the resident can sue he must sue in state court. The non-resident has an election. He may sue either in state or federal court. On this head the following are significant:

"If this section would authorize a suit in the state court then the plaintiff being a citizen of Missouri could maintain the action in the United States court".

Stonebraker v. Hunter, (C. C. A.) 215 Fed. 69, 70, citing *Cummings v. Bank*, 101 U. S. 153.

"We find that the Supreme Court of Oklahoma has uniformly held that such suit would not lie, and there being no allegation in the bill of any distinct ground of equitable jurisdiction, dismissal of the bill is affirmed".

Stonebraker v. Hunter, (C. C. A.) 215 Fed. 69, 70.

To put it another way — if no one may sue in the court of the state without first exhausting the state administrative tribunals, no one may sue in federal court without exhausting those tribunals.

It is ruled in *Bagley v. Butler*, 24 S. D. 429, one may not enter the courts until he has at least exhausted equalization. It would seem this applies to both resident

and non-resident. If it does not, there is no explaining the countless *federal* decisions that one must first exhaust the state administrative tribunals. If appellees are right the federal court should have entertained the suits on the ground that the provisions for administrative relief were void because an attempt by indirection to shut one who had the right to sue in federal court, out of that court.

VIII.

APPELLEES ARE ESTOPPED BY ACTION AND NON-ACTION TO ASSERT ANY INVALIDITY.

As to the Appellee City —

It signed the petition, was present at hearings; its commission visited the work; it furnished water for the job, put in a meter for it and was paid by the Board on bills presented — and it seems to be admitted that the project saved or at least helped save the water supply of the City. Gilseth was held estopped on less than this. Beyond question it estops the City to assert any invalidity. — *De Noma*, 28 S. D. 372.

Shepard v. Barron, 194 U. S. 583.

Wright v. Davidson, 181 U. S. 371.

Conde v. City, (N. Y.) 58 N. E. 130.

Vose, 44 N. Y. 415.

City v. Hill, (Wash.), 62 Pac. 446, and long line of cases cited; *Erickson*, (N. D.) 92 N. W. 850; *Vickey*, (Ind. Supp.) 32 N. E. 881 and cases cited.

The Circuit Court of Appeals disposed of the estoppel by statement that when the acts relied on for estoppel were done those who did them did not know the project was likely to affect them. How can that possibly be so as to the City?

Counsel for the City presents another avoidance, to-wit, that there is no estoppel because despite all done

by the City it is not estopped because the project work departed from the petition, violated the federal Constitution and was otherwise tainted with illegality.

This disregards (a) that the allegation of fact is unproved, and (b) since what the City did estops it to object on account of illegality it is not relieved from the estoppel by asserting illegality.

VIII-(a).

ESTOPPEL AS TO OTHER APPELLEES.

It is true no other of the appellees did so much to base estoppel as did the City. But it does not follow these others are not estopped. They are estopped because all done was open, notorious and long continued, and they stood by silently and made no objection and took no action until the work was finished.

McCoy v. Able, 131 Ind. 417; *Kellog*, 15 Ohio State 64; *Wiggin*, 9 Page 24; *Erickson*, (N. D.) 92 N. W. 849 — citing a long line.

In *Erickson v. County*, (N. D.), 92 N. W. 850, it is said on citation of *Smith v. Carlow*, (Mich.) 72 N. W. 22:

"The entire proceedings were open and notorious and evidently were known to most, if not all, who were affected. The courts were open to them to contest validity before the work was performed. Whatever advantage the system is to the public has been reaped. This brings the case within the well settled doctrine that when parties stand by and see the improvement made and take no steps to impeach invalidity, they are estopped to raise validity when called upon to pay."

To like effect is *Patterson v. Baumler*, 43 Iowa, 477, citing numerous cases. One thing said in the *Patterson* case is that the work of construction was adjacent to the property of those sought to be taxed, that they cannot

be presumed to be ignorant of any irregularity and must be presumed to have had notice of the action on the work and the causing of it to be prosecuted. A consent by implication is said to be established in such circumstances. See *Motz v. City*, 18 Mich. 495 (Cooley).

IX.

PASSING ALL ESTOPPELS, THE CITY MAY NOT BE HEARD AT ALL BECAUSE IT HAS NO DIVERSITY, AND WE CONTEND HAS NO SUBSTANTIAL FEDERAL QUESTION.

At this point we claim nothing for the fact that it was held below there had been no unconstitutionality; and concede that whether it was reasonable to assert unconstitutionality is raised by our assignments.

In the main, the basis of attack was unconstitutionality, and excessive taxation. We have seen that here neither raises a federal question.

It is our position that no substantial federal question was presented because at the time these bills were prepared it was as well settled as any law proposition has ever been that in a collateral action such as this the federal courts could grant no relief as to anything complained of in the bills.

X.

PASSING ALL ESTOPPELS, NO COURT WAS WARRANTED TO ENTERTAIN THESE SUITS ON THE CHANCERY SIDE. NO EQUITY SHOWN.

At the outset, it is to be noted that unless state law permits it, the federal courts are extremely reluctant to interfere with the collection of state taxes by injunction. And Congress has recognized that the process of injunction has been used too freely, by several statutes making injunction more difficult to obtain or forbidding

its use altogether. See *Boise v. Boise*, 213 U. S. 276.

It is settled that illegality of a tax, alone, will not base chancery jurisdiction. — There must, in addition, be present something that rightfully invokes that jurisdiction. — *Shelton v. Platt*, 139 U. S. 591. All this is conceded, and the sole question is whether appellees present more than illegality of tax.

(a). *They invoke multiplicity of suits.*

Multiplicity cannot successfully be invoked where the statutes give access to the Board of Review, and appeal from the decision of such Boards to the courts.

Indiana Company v. Keohne, 188 U. S. 681.

To the same effect is *Keokuk v. Salm*, 258 U. S. 122.

We add, in the words of *Boise v. Boise*, 213 U. S. 276, it does not appear any other suits are threatened, the ones brought so involve the whole controversy that no new suits are necessary, and that the doctrine is not invoked by suits that are threatened by these appellees who have already sued.

(b). *No immediate or irreparable injury is made to appear.*

A vague allegation of irreparable injury will not suffice.

Boise v. Boise, 213 U. S. 276, 29 Sup. Ct. 429.

Surely it is not an irremediable mischief such as gives chancery jurisdiction that one might be defeated on resort to lawful tribunals, including the right to go to appellate tribunals. Where such remedy exists no case of irreparable injury is made out. *Keokuk v. Salm*, 258 U. S. 122; 42 Sup. Ct. Rep. 208.

(c). *No cloud on title is possible, unless, perhaps, on the property of appellee Power Company.*

The appellees present that Section 8464 of the Code makes the assessment a valid and perfect lien and that this apparent valid lien (said to be in reality invalid) would cast a cloud. (R. Brief 21). To begin with, all cloud was the purest speculation and merest anticipation when the bills were filed, and, for that matter, when the injunction issued. At these times no tax of any sort was in existence. Wherefore no enforcement of tax could at that time cast any cloud. Section 8464 in plain language declares that no assessment may be made, to say nothing of being made effective, until after the ascertainment of benefits are equalized which the injunction stopped.

Again — the doctrine of casting clouds cannot be invoked against one whose real property may not be seized to enforce the collection of a tax. Sections 6606 and 6663 makes fairly clear that as to railroads taxes can be collected only out of sale of personal property. It directs collection to be made by selling engines, cars, rolling stock "and any personal property".

Sections 6662, 6663 and 6664 permit railroad companies to defend any suits brought against them to collect such tax, in which they may set up any defense which they have, even to attacking the validity thereof.

Moreover, if any statute had attempted to permit collection of taxes by selling some part of a railroad lying within South Dakota it would undoubtedly have been held to be an interference with Interstate Commerce. As said in *Union Pacific v. Ryan*, 113 U. S. 516, a railroad cannot be regarded as mere land as farms or building lots, that its value depends on its whole line as a unit, and any segregated section would be almost valueless, by itself.

As to the City — Section 8463 provides that enforcement of anything due from the City must be made by the assessing officers — and of course these may be commanded by *mandamus* to act.

Taxes against such parties are not enforced by distraint or levy but by suit to collect.

Keokuk v. Salm, 258 U. S. 112.

Averment that an assessment of capital stock on franchise constitutes a cloud on title will not sustain bill to restrain collection without allegation that corporation owns real property.

Indiana Co. v. Kochne, 188 U. S. 681.

Payne, (Calif.) 138 Pac. 967.

Union Pacific's case, 113 U. S. 516.

Greene's case, 244 U. S. 499.

(d). What has been said as to casting a cloud applies quite largely to the claim of lien attaching. See *Boise*, 213 U. S. 276. As said, at the time the injunctions issued, there was no lien possible.

Section 8467 says that the tax shall be a perpetual lien but says that this is so as to "tracts". We have appellees committed to the assertion that using the word "tract" found in another statute or found in a notice, does not give notice to either a railroad or a municipal corporation. If that be so, fixing a lien on "tracts" is not fixing a lien on any property of either a railroad or a municipal corporation.

But as said, liens at all event attach only to real property owned by someone whose real property may be sold for taxes — and neither railroads nor municipal corporations are in that class. There can be neither cloud or lien cast upon property of Railroads or City described.

X-(a).

ADEQUATE REMEDY AT LAW.

It is strenuously urged there was chancery jurisdiction because there exists no adequate remedy. The provisions for administrative tribunals alone constitute an

adequate remedy.

The *Ward* case, (Tenn.) 46 S. W. 575, approves the statement of Cooley on taxation, that "the statutory remedy of equalization is supposed to be adequate to all the requirements of justice, and it is the party's folly if he does not avail himself of it".

Administrative provisions give adequate remedy.

Milheim v. Moffat, 262 U. S. 710.

Indiana Co. v. Koehne, 188 U. S. 681.

Union Pacific v. Commissioners, (C. C. A.) 217 Fed. 456.

Wherefore there is not ground for equitable jurisdiction.

Boise v. Boise, 213 U. S. 276.

Dows v. Chicago, 11 Wall. 180.

Walla Walla v. Walla Walla, 172 U. S. 1, 19 Sup. Ct. 77.

Shelton v. Platt, 139 U. S. 591.

Having failed to object to a tentative *ad valorem* assessment, failure to ask modification of cost before the board of equalization, and before the tentative basis has been finally adopted, leaves the party with no sufficient ground of complaint.

Milheim v. Moffat, 262 U. S. 723.

Relief in equity depends on having sought correction from the Board of review and failure to secure redress.

Keokuk v. Salm, 258 U. S. 112, 42 Sup. Ct. 207, 208.

A subordinate but involved argument is that there was chancery jurisdiction because whatever remedy existed was not one that can be presented on the law side

of the federal court. It is held in *Shelton v. Platt*, 139 U. S. 591, and the *Walla Walla* case, 172 U. S. 1, 19 Sup. Ct. 77, that as to an illegal tax a damage suit may be enteretained on the law side of the federal court. Again, over and again is it asserted (and the Circuit Court of Appeals sustains the assertion) that the Board acted without color of right or authority, that it was a naked trespasser from the very commencement of the assessment proceedings. (P. 23, 34, 35, and also in the briefs of M., S. and O.). Surely, there is a remedy against a trespasser on the law side of the federal court, say, by a damage suit. There is no suggestion that the appellants are insolvent, and it is presumed they are solvent — moreover it seems to be settled that the existence of a threatened common trespass will not give equity jurisdiction.

No relief in equity as to tax which because of invalidity amounts to a common trespass.

Dows v. Chicago, 11 Wall. 80.

Some peculiar reasons are given why the chancery jurisdiction should be sustained. Largely, these reasons assert matters which we have attempted heretofore to show are immaterial and untenable under the law, and not sustained by the evidence.

For illustration — equity had jurisdiction because the project was “confessedly” a mere subterfuge — which was never confessed and is negatived by the express holding of the highest court of South Dakota.

Another “reason” is that there was the right to have equity investigate whether the board was acting without power and whether appellees were being deprived of due process of law. This is remarkable. It seems to be thoroughly settled that the chancery court has no jurisdiction *even if* the proposal of a tax has no authority back of it, or violated the Constitution. But

the court does have jurisdiction to find out whether what it could not act on, if established, existed.

Finally, that there was jurisdiction because the state statutes did not provide the right to bring suit for the recovery back of illegal taxes paid under protest. That such provision would have constituted an adequate remedy at law we concede. But there are a number of things that might be such remedies that the state statute did not provide for. How is it material if there are other sufficient provisions to constitute adequate remedy at law? And what of it, that no statutory right is given to recover back? If, as appellees urge, the members of the Board were mere trespassers there was always the common law right to bring suit to recover back anything that these trespassers had obtained by their trespass.

It might be added that the very fact that there is no remedy in equity proves there is one on the law side, for it cannot be assumed the law has left a wrong without a remedy.

XI.

PASSING ALL ESTOPPELS, THERE WAS IN FACT NO VIOLATION OF THE FEDERAL CONSTITUTION.

The Board was acting under the taxing power. — *People v. Mayor*, 4 N. Y. 419; *Roberts v. Smith*, (Mich.) 72 N. W. 1092. As to what should be included in the District, its action was a political matter. — *Bemis*, (Ind.) 105 N. E. 497. — And it would not deny due process if notice as to boundaries were not required. *Ross v. Board*, (Iowa) 104 N. W. 506.

Being an exercise of the taxing power, one reserved to the states, the courts may not interfere because of the method, manner or details of apportionment, equalization and collection adopted and fixed by the proper state

authority; nor with their method of determination or the agencies chosen to carry on; nor because of the method and manner of notice, or the kind of notice adopted — and many times all such action has been held to satisfy the Constitution — even where what was done was much more open to such objections than those urged by appellees, or anything done or omitted here.

NOTICE GIVEN, SUFFICIENT.

No notice showing intended classifying as to assessment is necessary.

Ross v. Board, (Iowa) 104 N. W. 506.

In *Curtiss v. Pound*, 34 S. D. 628, the notice to City and Railroads is held sufficient. In it —

A township unsuccessfully contended it had no notice because it could not infer from the notice whether the township was to be affected, that it was not named and had no reason to believe it would be benefited or damaged by the proposed drainage. It was further held the owner need not be named, and that all that was necessary was a general description of the lands to be affected.

It suffices that appeal is provided. — *Bemis*, (Ind.) 105 N. E. 497.

It suffices that notice is given at some time before the assessment becomes final. — *Idem*. This is true as to the question of what may rightly be included in the District; — *Voight*, 184 U. S. 115; 22 Sup. Ct. 337, — this, even where no notice was given before establishment, as to establishing. *Goodrich v. Detroit*, 184 U. S. 432, 22 Sup. Ct. 397.

Sections 8459, 8461 and 8462 provide for due notice on whether there is necessity for establishing. Section 8463, for due notice as to assessment. — Section 8476 is a complete harmonizer as to notice requirements. It provides:

"All proceedings affecting right of persons in the establishment must be had on such notice as the statute requires to be given as to construction of drains."

Thus, it puts straightening or enlargement of old drains previously constructed, in the same class as an original drainage project; and provides for due notice as to inclusion, whether in the old drainage district or not. This applies particularly to the enlargement proceeding in the cases at bar.

It is settled by the highest court of the State that the notice which the trial Judge found sufficient was sufficient under the statutes of the State.

State v. Pound, 34 S. D. 628, 150 N. W. 287, 288.

Gilseth v. Risty, 46 S. D. 372.

And such is the holding of

Lamb v. Connolly, (N. Y.) 25 N. E., 1043, 1044.

Hennessey v. Douglas, (Wis.) 74 N. W. 987.

Pittsburgh v. Backus, 154 U. S. 421.

Under Sections 6663 and 6664, the railroad appellees had opportunity to present all they complain of, by way of defense to a suit to collect.

The opportunity to be heard as to the petition is penary. (Sections 8461, 8462). For one thing, the notice as to this hearing, "shall refer to the files in the proceedings for further particulars. Such notice shall summon *all persons affected* by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed."

And Section 8461 provides for a notice that shall contain:

A description of the exact line and width of the ditch as determined by the board, describing

"the tract of country likely to be affected thereby, in general terms."

So the property sought "to be affected" is required to be described even though its owners are not named, and the notice given describes said land by sections, townships, ranges, and city sub-divisions.

It would not deny due process if no notice of hearing on sufficiency of the petition had been provided. — *Bemis*, (Ind.) 105 N. E. 497.

There was power to determine what lands were benefited. *Voight*, 184 U. S. 115, 22 Sup. Ct. 337 — and at least one appellee seems to concede this. (Brief R. 35).

All held in *Georgia v. Wright*, 207 U. S. 127, is that the opportunity to be heard is too much limited. The laws of Georgia seem to deny about all notice and hearing that the laws of South Dakota give.

XII.

THERE IS IN FACT NOTHING ARBITRARY
EITHER IN STATUTE OR ADMINISTRATION OF
STATUTE.

What is arbitrary in taxation is described in *Brus-haber v. Union Pacific*, 240 U. S. 1, 36 Sup. Ct. 237, to be a tax that transcends the conception of all taxation, is a mere arbitrary use of power, forces courts to the conclusion that it is not the exertion of taxation but an attempt to confiscate, and is so wanting in basis for classification as to produce such gross patent inequality as leads inevitably to the same conclusion. This is the standard then to measure by — in which connection it is not amiss to add that the *pleadings* do not seem to attack the *statute* for being arbitrary but are addressed to arbitrary conduct by those who proceeded under statute. In argument, however, this is enlarged and we

are told the statute is so arbitrary as to be unconstitutional because it fixes no definite standard for benefits. (N. 8; P. 8). And *Martin v. District*, 205 U. S. 135, is cited and appears to be a case on a statute that *was* so lacking in definite standard. Passing the question of pleading, the statute itself (Section 8463) follows Section 6, Article 21 of the Constitution in providing that the special assessments shall be raised according to benefits "among the lands affected".

There is no limitation that it shall be *upon* or among lands *used for agricultural purposes*. There is no suggestion that railroads or cities shall not be assessed for benefits resulting to their property. The board then fixes a time and place for equalizing the same. Notice of such equalization shall be given by publication and posting. Said notice shall state (1) the width and route of the drainage; (2) a description of each tract of land affected by the proposed drainage; (3) and the names of the owners of the several tracts of land as appears from the records in the office of the Register of Deeds; and (4) the proportion of benefit fixed against "*each tract of (or) property* *", and shall notify all such owners to show cause why the proportion of benefits shall not be fixed as stated.

Under clause 4 above, the statute now reads "each tract *of* property", and is evidently a typographical error on the revision, as the original statute of 1907 read "each tract *or* property". Since the statute specifically directs that "all such owners" be notified to show cause, (Sec. 8463) it cannot be said that owners of one class of property are required to be notified, and that no provision is made for notifying owners of property used for a different purpose, (City or Railroad Companies).

It is of course also argued that the board did not follow this statute. (R. 33; P. 29). All that need be said as to this is that the evidence does not sustain the assertion. The main support of the assertion that the board acted arbitrarily is (1), that it listened and

was largely influenced by the advice of its engineer and that this engineer was too ignorant to be a competent advisor; and (2) that an apportionment of benefits made in 1919 as to a proposed system which was abandoned made the apportionment much lower, and that the 1919 action in this regard is sacrosanct, and any great departure from it proves arbitrariness.

The evidence is set forth fairly well in the briefs of the appellees (N. 27, 28, 29; P. 28, 29) and we may fairly claim for *Pittsburg Railway v. Backus*, 154 U. S. 420, that the evidence does not sustain the contention. In that case it was said:

"Is testimony that the value placed by the board was excessive together with testimony that portions of the road outside of the state were of largely greater value than any similar length of road within the state, unaccompanied with evidence that the board reached the valuation by simply dividing the total value of the company's property on a mileage basis, or that it failed to take into consideration the fact of such excessive value of portions outside the state, sufficient to impeach its determination? This question must be answered in the negative. No determination of a special board, charged under the law with the duty of placing a value upon property, can be successfully impeached by such meager testimony".

We have the rather remarkable argument that there was arbitrariness and undue discrimination worked by equalization — remarkable, because the injunction prevented there being any equalization. Then there is "argument" that here was arbitrariness because the benefits were not derived directly or indirectly from the drainage of agricultural lands. As to this we have said already all that seems to be necessary.

The cases of *Thomas v. Railway*, 277 Fed. 608, and *Kansas City v. Road District*, 256 U. S. 658; and that of *Gast*, 240 U. S. 55, involve an attack upon the statute

for being arbitrary which is not made in the pleadings in the case at bar, and each of the three exhibits a situation that comes fairly within the description of *Brus-haber's* case.

Let it again be noted it is impossible to hold that the apportionment was arbitrary for being either unequal or excessive, because the act of the appellees left the apportionment purely tentative and no one can say whether it would be either unequal or arbitrary if appellees had permitted equalization to be proceeded with.

XII-(a).

METHOD OF DETERMINING BENEFITS.

If there is a possibility of direct or indirect present benefit or a potential present benefit, based on reasonable facts, which benefits are determined by a method which can be reasonably presumed will produce substantial equality between lands and properties, and if all property of the same class is operated on alike, the tax and the method pursued is not arbitrary.

"Traffic benefits resulting from the haul of increased croppage of lands within a drainage district, because of over-flow protection, are sufficient to authorize assessment of railroad property for improvements within such district, though there were no direct benefits, by way of protecting the company's right-of-way from overflow".

Thomas v. Kansas City Southern Ry. Co., 272 Fed. 708.

"There must be added the obvious fact that anything that develops the territory which a railroad serves must necessarily be a benefit to it, and that no agency for such development equals that of good roads — and the holding of the Circuit Court

of Appeals that the railroad would not be benefited by the improvement cannot be sustained".

Branson v. Bush, 251 U. S. 182, 40 Sup. Ct. 116.

The drainage act provides that in apportioning benefits among the several tracts and property benefited by the system the board shall select one tract, "the benefit" received "*by which*" shall be taken as the unit from which to measure the benefits received by the other tracts and property. This does not make it arbitrary to use "the benefit" in dollars received by any tract of any class as the unit from which to estimate the proportionate benefit received by any other tract or property of either class — the sole thing aimed at being the ascertainment of what proportion of the total amount to be assessed should be borne by each tract, or property. *Milne v. McKinnon*, 32 S. D. 627.

The capitalization method of determining the amount of actual benefit in cases like this, has been approved in *Western Railway v. Commissioners*, 261 U. S. 264. And the method of assessment in

Railway v. Supervisors, (Iowa) 153 N. W. 110.

Marion v. Simons, (Ind.), 102 N. E. 132.

Drainage District v. Railway, (Nebr.) 146 N. W. 1055.

Chicago, Rock Island v. County, (Iowa) 154 N. W. 888.

Northern Pacific v. Board, (Wash.) 181 Pac. 868.

Northern Pacific v. County, (N. D.) 148 N. W. 545.

Spring Creek v. Railway, (Ill.) 94 N. E. 529.

Illinois Central v. Commissioners, (Ill.) 21 N. E. 926.

XIII.

THERE WAS IN FACT NO PROHIBITED DISCRIMINATION, IF ANY, AND NOT MORE THAN PERMITTED CLASSIFICATION.

It is held in at least ten decisions in this court that classification for tax purposes is permissible and is not in contravention of the equal protection clause of the Fourteenth Amendment, so long as all persons similarly situated are treated alike.

It is not necessary that the benefits assessed and those in fact received should be exactly equal.

Southern Ry. v. Watts, 260 U. S. 519.

Stanley v. County, 121 U. S. 535.

There should not be extracted from the very general language of the Fourteenth Amendment a system of delusive exactness. — *Martin v. Dist.*, 205 U. S. 135, 27 Sup. Ct. 441.

The Fourteenth Amendment "was not intended to compel the states to adopt an iron rule of equal taxation". — *Branson v. Bush*, 251 U. S. 182, 40 Sup. Ct. 115.

What is condemned is wilful disregard of law requiring uniformity in valuation and taxation — *Western Union v. Missouri*, 190 U. S. 412; *Stanley v. County*, 121 U. S. 535. Here, there was no disregard, wilful or other, because Section 2, Article 11, South Dakota Constitution, empowers the legislature to divide all property into classes for the purpose of taxation and only requires that all property of the same class should be taxed uniformly.

For illustration — the following have been held to be not improperly discriminatory:

Allowing deduction for interest in income tax

return to one class of corporations and not to a different class or to individuals.

Brushaber, 240 U. S. 1, 36 Sup. Ct. 237.

Allowing individuals to deduct from gross income dividends paid them by corporations whose incomes are taxed and not allowing the same deduction to such corporation. — *Idem*.

Though family expenses are not as a rule deductible, allowing farmers to omit from their return certain products which are susceptible to use by the family. — *Idem*.

Excusing owners of the house they live in from giving an estimate of rental value, and not allowing renters to deduct rent paid. — *Idem*.

And as to discrimination by valuation it has been held that a disproportionate assessment is but an excessive one — from which relief will not be granted to those who have not invoked the aid of the equalization board — *Bagley v. Butler*, 24 S. D. 429. — So, where a corporation was assessed on basis of 75 per cent of actual value — property generally not more than 52 per cent — *Greene v. Railway*, 244 U. S. 522.

And so where one class was assessed at one-third actual value, and others at less than one-fifth. — *Union Pacific v. Commis.*, (C. C. A.) 217 Fed. 541.

XIII-(a).

ELEMENTS OF BENEFIT.

That different elements of benefits enter into different classes of property, is immaterial. The law does not require that a farm as such shall be compared with a railroad track or a high-way or with the grade of the bridges of a City or of a railroad company.

Though benefits to a railroad company as such are composed of different and larger number of elements than real estate consisting, say, of land, which latter can be determined by estimating value before and after — it is still allowable to tax benefits to a railroad company, say, to right-of-way, bridges, culverts, embankments, tracks, and uninterrupted traffic and saving in annual maintenance.

Railroad v. Supervisors, (Iowa) 153 N. W. 110.

Marion, (Ind.) 102 N. E. 132.

Drainage No. 1 v. Railway, (Nebr.) 146 N. W. 1055.

Chicago and R. I. Ry. v. Wright, (Iowa) 154 N. W. 888.

Northern Pacific Railway v. Board, (Wash.) 181 Pac. 868.

Northern Pacific v. County, (N. D.) 148 N. W. 545.

Spring Creek District, (Ill.) 94 N. E. 529.

Illinois Central v. Commissioners, (Ill.) 21 N. E. 926.

Railroads differ in so many respects from other properties that they as a class must be taxed differently or additionally so long as that is not inconsistent with the Constitution of the state.

Southern Railway v. Watts, 260 U. S. 519.

43 Sup. Ct. 197.

"The equal protection clause is not violated by prescribing different rules of taxation for railroad companies than for concerns engaged in other lines of business". — *Baker v. Druesedowe*, 263 U. S. 137, 44 Sup. Ct. at 41.

Proper method so long as railroads are not dealt with differently than those in its class. —

Kent Railway case, 115 U. S. 321; *Durham*, 261 U. S. 149; *Valley Company*, 261 U. S. 155.

And we have this sample of hyper criticism:

The statute itself is discriminatory because as to lands affected it fixes the apportionment of benefits and as to the property of railroads it is "the benefits". In the one case it requires relative benefit and in the other of an actual benefit. And if the benefits should materially exceed the cost, the result of the discrimination would be most obvious. (N. brief 25.)

XIV.

THE CONTENTION THAT THE EVIDENCE SHOWS NO BENEFIT WAS RECEIVED.

As to this we have the opinion of a witness that the project did the interests of the Power Company harm rather than good because diversion of water of any kind would diminish its power. We think the testimony on this head is clearly over-borne by the testimony as a whole. Next comes the opinion of employees of the appellees that there was no benefit whatever to either right-of-way, tracks, bridges, embankment grounds, or station grounds. Next, an opinion that the system does not take enough water out of the river to make any material difference although it had just been said for the same side that it took so much that it injured the Power Company. Then we have the opinion of one of the employees that if he were planning to shorten bridges he would act as though this ditch did not exist. Next, opinion that the new spillway is as liable to go out as the old one — a defect that does not seem to have been charged in pleading.

Then comes a line by the employees which involves past history. Bassett says that no property of the Great Northern has to his knowledge ever been flooded; and he and Link and Reed unite on the proposition that both

Power Company and railroad property are so constructed as to be flood proof. Bassett supports this by the fact that the Great Northern banks have high slope, that there is a growth of grass and weeds and rip rap, and that therefore the embankments of the Great Northern will withstand any possible flood conditions. Another basis for the claim that no benefits were received, (if not worse) is that the engineer of the Board was ignorant — something hardly borne out by the record and the statement of qualification and experience in the record as to this engineer which seems to be disputed in argument only.

We are content to stop with saying that if there is any reason to complain of benefits tentatively assessed, if there is any reason why the proposed assessment is too high, or to say that no benefits were being received, that was all a matter for the Board of Equalization and if necessary for appeal to the Circuit Court of the state — *Curtiss v. Pound*, 34 S. D. 633. We are content with the holding of *Pittsburg v. Backus*, 154 U. S. 421, on sufficiency of testimony herein earlier set out. And, finally, submit we have heretofore made clear, it may fairly be said, on this record that unquestionably the appellee City received a benefit, and the record is equally clear that, within rules we have heretofore called attention to, each of the other appellees was benefited in some degree at least. That the proposed assessment seemed greater to them than the benefit received was, as said, a matter to be first presented to the administrative tribunals.

XV.

In the case of the appellee Milwaukee and appellee Omaha the trial Court refrained from enjoining the making of *any* assessment leaving it open for later determination how much the assessment should be in view of the fact that these two appellees had previously been assessed for the construction of the old ditches. It seems

the City is in exactly the same situation. But as to it the injunction stops *all* assessment, without the reservation made as to the Milwaukee and Omaha — and the Circuit Court of Appeals left this matter uncorrected, also.

Respectfully submitted,

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Appendix "A"

SOUTH DAKOTA REVISED CODE 1919.

NATURE OF PROPERTY.

Sec. 256. REAL PROPERTY DEFINED. Real or immovable property consists of:

1. Land.
2. That which is affixed to land.
3. That which is incidental or appurtenant to land.
4. That which is immovable by law.

Sec. 257. LAND DEFINED. Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock or other substance.

COLLECTION OF TAXES.

Sec. 6662. CIVIL ACTION TO COLLECT, PROCEDURE. In case any railroad company, telegraph company, telephone company, express company, sleeping car company, private car line company, or other company or corporation coming within the provisions of this chapter, shall refuse or neglect, for a period of thirty days after the same shall have become delinquent, to pay any tax levied against it the state or county treasurer to whom such tax is payable shall have the power, in addition to other remedies provided by law for the collection of personal property taxes, to institute and main-

tain an action in the circuit court, in his name as such treasurer, against such company to collect the tax, with penalties and interest as provided by law. In any such action it shall be sufficient for the treasurer to allege in his complaint that the taxes stand charged upon his books against such company and the same are due and unpaid, and that a debt is thereby created, and that such company is indebted in the amount appearing to be due on the treasurer's books. The treasurer's books shall be received as prima facie evidence, on the trial of the action, of the amount and validity of such tax appearing due and unpaid thereon, and of the non-payment of the same. If on the trial of the action it shall be found that such company is so indebted, judgment shall be rendered in favor of the treasurer prosecuting such action for the taxes, penalties and costs as in other actions. The defendant may set up by way of answer any defense which it may have to the collection of such taxes. If the defendant claims the tax to be void, the court must in the action ascertain the just amount of taxes due for the year it is claimed the taxes are delinquent, and if, in its opinion, the assessment or any subsequent proceeding has been rendered void or voidable by the omission or commission of any act required or prohibited, the court shall order it reassessed by the tax commission, and shall thereupon render judgment for the just amount of taxes due from the defendant for that year or years.

Sec. 6663. SPECIAL ASSESSMENTS, PROCEDURE. If any railway company shall neglect or refuse to pay any special assessment levied against such railway company, the county treasurer, city treasurer, or other officer charged with its collection, whenever such special assessment shall become delinquent, shall collect the same by seizure of engines, cars, rolling stock, and any personal property of such company, in an amount sufficient to pay such special assessment, with accrued penalty and interest, and all accrued costs, wherever the same may be found in the county or coun-

(iii)

ties in which such special assessment may have been made and levied, and shall immediately proceed to advertise the same for sale in three public places in the county, or by advertisement in one of the newspapers published in the county where such property is taken, for a period of at least ten days before such sale, stating the time when and place where such property will be sold. And, if the special assessment or assessments for which such property is distrained, and the accrued costs thereon, are not paid before the day appointed for such sale, such treasurer shall proceed to sell such property at public auction, or so much thereof as shall be sufficient to pay such special assessment, penalty and cost of such seizure and sale. Any surplus remaining above the special assessment or assessments, charges for keeping, fees for sale, fees for levying on the property and mileage, as allowed by law, shall be returned to the owner; and the treasurer shall, on demand, render an account in writing of the sale and charges. If the property so distrained and seized cannot be sold for want of bidders, the treasurer shall return a statement of the fact, and return the property to the possession of the railway company from which the same was taken and such tax shall be returned as unpaid.

Sec. 6664. GENERAL TAX PROVISIONS APPLICABLE. The provisions of this code relating to general taxes shall apply to the enforcement and collection of any delinquent special assessment against a railway company, so far as such provisions are applicable, and wherever in this code reference is made to general taxes, the same shall be construed to include special assessments, as well as taxes for general purposes.